IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals, Second Circuit, dated and entered in this case June 22, 1977 and February 1, 1978.

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* Petitioners, who were defendants in the District Court, appellants-cross-appellees in the appeal to the Circuit Court are the New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, William J. Ronan, individually and in his capacity as a member and as chairman and chief executive officer of the New York City Transit Authority and also as a director and as chairman and chief executive officer of the Manhattan and Bronx Surface Transit Operating Authority, and his successors in office, William L. Butcher, Lawrence R. Bailey, Harold L. Fisher, William A. Shea, Eben W. Pyne, Leonard Braun, "Justine" N. Feldman, Donald H. Elliott, Frederic B. Powers and Mortimer Gleeson, individually and in their capacities as members of the New York City Transit Authority and directors of the Manhattan and Bronx Surface Transit Operating Authority, and their successors in office; Wilbur B. McLaren, individually and in his capacity as executive officer for labor

Opinions Below

The opinion of the United States Court of Appeals, Second Circuit, of June 22, 1977 is reported at 558 F.2d 97 (1977), and reprinted as Appendix A annexed hereto (*infra*, p. 1a). The opinion of the United States Court of Appeals, Second Circuit, entered on February 1, 1978, denying petitioners' petition for rehearing is unreported and appears as Appendix B (*infra*, p. 9a). The opinion of the United States District Court for the Southern District of New York dated August 6, 1975, is reported at 399 F. Supp. 1032 and reprinted as Appendix C (*infra*, p. 11a). The Supplemental Opinion of the United States District Court for the Southern District of New York dated May 5, 1975, is reported at 414 F. Supp. 277 and reprinted as Appendix D *infra*, p. 70a).

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relations and personnel of the New York City Transit Authority, and his successors in office; Louis Lanzetta, individually and in his capacity as medical director of the New York City Transit Authority, and his successors in office. The Civil Service Commission of New York; Personnel Department of the City of New York; Harry I. Bronstein, individually and in his capacity as a member and as Chairman of the Civil Service Commission of the City of New York, and director of the Personnel Department of the City of New York, and his successors in office; David Stadtmauer and James W. Smith, individually and in their capacities as members of the Civil Service Commission of New York, and their successors in office, were dismissed from the action after the District Court judgment.

** Respondents, who were plaintiffs in the District Court, respondents-cross-appellants in the appeal to the Circuit Court are Carl Beazer; Jose R. Reyes; Francisco Diaz; Malcolm K. Frasier, individually and on behalf of all others similarly situated. Nathaniel Wright was added as a named plaintiff-appellee-cross-appellant member of the class after the District Court trial had begun.

Jurisdiction

The judgment of the United States Court of Appeals, Second Circuit was entered on June 22, 1977, Appendix A (*infra*, p. 1a). A motion and petition for a rehearing en banc was denied by the United States Court of Appeals, Second Circuit on February 1, 1978 Appendix B (*infra*, p. 9a). An order granting petitioners' motion for stay of mandate was entered on March 10, 1978. This petition for certiorari was filed within 90 days of the order denying rehearing and within 30 days of the order granting stay of mandate Appendix K (p. 102a, *infra*). The jurisdiction of this Court rests on 28 USC § 1254(1).

Questions Presented

1. Are a public transit authority and/or its officials "persons" subject to suit under the Civil Rights Act of 1871 (42 USC § 1983)?
2. If petitioners are subject to suit under the Civil Rights Act of 1871, are they liable for awards of back pay and attorneys' fees?
3. Is the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs, an unconstitutional denial of due process and equal protection under the Fourteenth Amendment?
4. Is the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs, an unlawful racial discrimination under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq.?

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment, Section 1 of the Constitution of the United States; Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq.; the Civil Rights Act of 1871, 42 U.S.C. § 1983; New York State Public Authorities Law §§ 1200, et seq.; Civil Rights Attorneys' Fees Awards Act of 1976, 28 U.S.C. § 1988; 28 U.S.C. § 1254(1), are set out in Appendices F through J.

Statement

This class action was commenced under 28 USC § 1331, 42 USC § 1983 and 42 USC § 2000e.

The gravamen of the suit was the alleged unconstitutionality of the petitioners' policy of excluding from employment former heroin addicts who are participants in or have completed a methadone maintenance program. The class is composed of all such persons who have been, or would in the future be, subject to dismissal or rejection for employment by the petitioners.

The district court found, under 42 USC § 1983, that the petitioners' exclusion of present and past methadone maintained persons from employment in any position in the New York City Transit Authority was a violation of the due process and equal protection clauses of the Fourteenth Amendment. The court, *inter alia*, ordered the petitioners to give individual consideration to each methadone maintained employee or applicant for employment, and awarded back pay. The district court dismissed the petition as to defendant New York City Civil Service Commission, New

York City Personnel Department, and their named officials.

On May 5, 1976, the district court issued a supplemental opinion finding the petitioners guilty of discrimination under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, et seq. as amended, for the sole purpose of establishing jurisdiction to award attorneys' fees. On January 24, 1977, following the enactment of the Civil Rights Attorneys' Fees Act of 1976, 42 USC § 1988, the district court issued an Amended Permanent Injunction and Judgment (Appendix E, p. 75a, *infra*) basing its award of attorneys' fees on that Act. The attorneys' fees awarded by the district court were in the sum of $375,000.00 for legal services performed up to October 8, 1976.

The United States Court of Appeals, Second Circuit, affirmed the opinion of the court below, except it reversed the dismissal as to Beazer, Reyes and Wright, remanded the case to the district court for determination of positions to which Beazer, Reyes and Wright should be reinstated and the amount of back pay due them, and reduced the attorneys' fee award by the sum of $50,710.00, the amount given by the district court as a "premium" for legal work performed.

REASONS FOR GRANTING WRIT

I.

This case involves issues similar to issues now pending before this Court in another case.

In *Monell* v. *Dept. of Soc. Serv. of the City of New York,* 532 F.2d 259 (1976), cert. granted 429 U.S. 1071 (1977), this Court granted certiorari on the question of whether local government officials and/or local independent school boards are "persons" subject to suit under 42 USC § 1983, where relief in the nature of back pay was sought against them in their official capacities.

The instant case thus shares with *Monell* the issues of whether a public agency or its officials are "persons" subject to suit for monetary relief under 42 USC § 1983.

II.

The court below has decided substantial and important federal questions in a way which is not in accord with applicable decisions of this Court.

A. ***The decision below asserts jurisdiction over an independent public transit authority and its officials under 42 USC § 1983, and therefore conflicts with this Court's decisions in* Monroe v. Pape, *365 U.S. 167 and* City of Kenosha v. Bruno, *412 U.S. 507.***

In *Monroe* v. *Pape,* 365 U.S. 167 (1961), and *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973), this Court ruled that a municipality is not a "person" subject to suit under 42 USC § 1983 (the Civil Rights Act of 1871) for either monetary or equitable relief. The courts of the various

circuits have applied this principle repeatedly to the states and other governmental bodies as well as to municipalities. *Kostka* v. *Hogg,* 560 F.2d 37 (1st Cir. 1977); *Bennett* v. *California,* 406 F.2d 36 (9th Cir. 1969); *Guardian Association of New York* v. *Civil Service Commission,* 431 F. Supp. 526 (SDNY 1977).

The petitioner Transit Authority was created by the legislature as a public benefit corporation to perform the governmental function of operating the transit facilities owned by the City of New York. These functions previously were vested in the Board of Transportation of the City of New York, a former city agency. The Transit Authority is composed of members appointed by the Governor by and with the advice and consent of the Senate. (Public Authorities Law, §§ 1201.1, 1202.1, 1202.2; *Lerner* v. *Casey,* 2 NY 2d 355 (1957), aff'd 357 US 468 (1958)). The Authority has been held not to be a "person" subject to suit under § 1983. (*Sams* v. *New York State Board of Parole, et al.,* 352 F. Supp. 296 (SDNY 1972), appeal dismissed 2nd Cir. 12/11/73).

In the course of its opinion in *Monell, supra* (532 F.2d at 263), the Second Circuit observed that the New York City Transit Authority is not a person within the meaning of § 1983. Yet in the present case, the same Second Circuit asserted jurisdiction over the Transit Authority under that same statute.

Other agencies similar to the Authority also have been found not to be persons under § 1983, see *Jagnandan* v. *Giles,* 538 F.2d 1166 (5th Cir. 1976), cert. den. 432 U.S. 910 (1977); *Lloyd* v. *Regional Transportation Authority,* 548 F.2d 1277 (7th Cir. 1977); *International Society for Krishna Consciousness, Inc.* v. *N.Y. Port Authority,* 425 F. Supp. 681 (SDNY 1977).

The doctrine that municipalities are immune from suit for both equitable and monetary relief under 42 USC § 1983 (*Monroe* v. *Pape, supra; City of Kenosha* v. *Bruno, supra*), should be equally applicable to public officials. To rule otherwise would effectively remove the immunity provided municipalities by Congress under 42 USC § 1983.

Under New York law, the individually named petitioners herein are duly appointed public officials of an agency of the State of New York (Public Authorities Law, § 1201.2) and the entire thrust of this proceeding is obviously directed to that agency. When such public officials are sued in their official capacities, with the result that liability in equity or damages will be imposed on the State, a subdivision of the State, or a municipality, the suit is, in actuality "one against the State or municipality even though the State or municipality is not named as a defendant" (*Westberry* v. *Fisher,* 309 F. Supp. 12, 18 [D.C. Me. 1970]). Cf. *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U.S. 573 (1946); *Ford Motor Co.* v. *Dept. of Treasury of Ind.,* 323 U.S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47 (1944).

At most, public officials, in their official capacity, have been held subject only to injunctive or declaratory relief under § 1983. Thus, in *Bennett* v. *Gravelle,* 323 F. Supp. 203 (D.C. Md. 1971), aff'd 451 F.2d 1011 (1971), cert. dismissed 407 U.S. 917 (1972), in dismissing a complaint for alleged discrimination brought against the Chairman and Members of the Washington Sanitary Commission, the court said:

> In their official capacities, the Commissioners are extensions of the municipal agency and are, therefore,

> not 'persons' within the meaning of § 1983. Accordingly, damages may not be assessed against the defendants under this section for acting in their official capacities. 323 F. Supp. at 211.

See also *Worley* v. *California Department of Correction,* 432 F.2d 769 (9th Cir. 1970) and *Silver* v. *Dickson,* 403 F. 2d 642 (4th Cir. 1968), cert. den. 394 U.S. 990 (1969).

This Court recently clarified the scope of immunity of government officials from liability for damages under § 1983. In *Wood* v. *Strickland,* 420 U.S. 308 (1975), an action for damages under § 1983 against school board officials, the Court declared (at p. 318) that "common-law tradition recognized in our prior decisions, and strong public policy reasons" required the extension of a qualified good faith immunity to the school officials. The Court stated further (at p. 322):

> A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

See also *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), in which the Court took note of:

> . . . (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good. 416 U.S. at 239.

In the case at bar, no finding of bad faith was made by the courts below, and consequently, no award of monetary damages could properly be made. As will be demonstrated *infra*, awards of back pay and attorneys' fees must be regarded as monetary damages.

III.

Important and substantial federal questions herein have not heretofore been specifically determined by this Court.

A. *Back pay and attorneys' fees are monetary costs which are indistinguishable from damages, and therefore should not be assessed against public officials under 42 USC § 1983.*

The courts below awarded back pay to members of the affected class, and attorneys' fees in the sum of $324,290 for legal services performed up to October 8, 1976.

In *Monell* v. *Department of Social Services of the City of New York*, 532 F.2d 259 (2d Cir. 1976), cert. granted 429 U.S. 1071, the Second Circuit looked to the legislative history of 42 USC § 1983, recited by Mr. Justice Douglas in *City of Kenosha* v. *Bruno, supra*, 412 U.S. at 516, 517-520 and found that:

> . . . if we try to adjust the grievances of the present plaintiffs by allowing the remedy of back pay under § 1983 . . . we would be broadening the indirect remedy of damages generally against cities, which we are reluctant to do for reasons of precedent and concomitant policy.
>
> • • •

> The claim for back pay is not merely an adjunct of equitable relief. It stands singly as a claim for damages which cannot be distinguished from many other claims for violations of civil rights in actions which do not involve employment discrimination. 532 F.2d at 267.

Similar findings were made in *Muzquiz* v. *City of San Antonio*, 528 F.2d 499 (5th Cir. 1976); *Patton* v. *Conrad Area School District*, 388 F. Supp. 410 (D. Delaware, 1975).

As this Court observed in *Wood* v. *Strickland*, 420 U.S. 308, 319-320 (1974):

> The imposition of *monetary costs* for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious school decision-maker from exercising his judgment independently, forcefully and in a manner best serving the long term interests of the school and students. (emphasis added)

Both attorneys fees and back pay awarded herein are "monetary costs," the liability for which would effectively impede the administrative decision-making processes of the petitioners. The financial burden which these monetary costs would impose on the petitioners and on the City and State treasuries which subsidize the petitioners, would be the same whether the award were labeled "damages" or "equitable."

This Court's concern with reality rather than with labels was demonstrated in *Edelman* v. *Jordan*, 415 U.S. 651 (1973), where it was found, as cited by the Court of Appeals in *Owen* v. *City of Independence, Missouri*, 560 F. 2d 925, 932 (8th Cir. 1977),

> . . . that a request for retroactive welfare benefits, even if entitled 'equitable restitution' and made part of an equitable decree in a suit against a state official, is in reality a suit against the state barred by the eleventh amendment if the retroactive benefits are to be paid from the state treasury.

While no Eleventh Amendment claim is made in the case at bar, a similar immunity is provided to public agencies under 42 USC § 1983. The Congress, in its enactment of the Civil Rights Act of 1871 (subsequently 42 USC § 1983), clearly intended to prevent the depletion of public treasuries through the imposition of damage liability upon municipalities or their officials. (See discussion *Monroe* v. *Pape, supra,* pp. 187-192 and *City of Kenosha* v. *Bruno, supra,* pp. 516-520.) If, by labeling attorneys fees and back pay as "equitable" or "costs," they thereby are not deemed as great a threat to public treasuries as are damage awards, a semantic nicety will have overridden the clear intent of Congress.

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 USC § 1988, should not be construed to overcome the immunity provided to public agencies and their officials under § 1983. While Congress, by express language, could have subjected public agencies to awards of attorneys fees in actions brought under § 1983, the Attorneys' Fees Awards Act contains no such express language. In the absence of explicit statutory language subjecting public agencies and officials to liability for attorneys fees, the courts should be reluctant to find an implied waiver of the immunity provided such officials and agencies under § 1983. Cf. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976);

Skehan v. *Board of Trustees of Bloomsburg State College,* 436 F. Supp. 657 (M.D. Pa. 1977).

B. *The court below improperly applied the strict scrutiny standard in finding a denial of due process and equal protection, since this case involves neither a suspect classification nor a fundamental right.*

The courts below found that the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs was an unconstitutional denial of due process and equal protection under the Fourteenth Amendment. In reaching this conclusion, both the district court and the Circuit Court expressly relied on cases (principally, *Sugarman* v. *Dougall,* 413 U.S. 634 [1973]), which had applied the strict scrutiny standard reserved for cases involving a suspect classification or a fundamental interest. (See Circuit Court decision, 558 F. 2d at p. 99, and district court decision 399 F. Supp. at p. 1057.)

The group involved in the instant case, drug users, is not within the suspect categories which have been enumerated by this Court (e.g., race [*Korematsu* v. *United States,* 323 U.S. 213 (1944)]; alienage [*Graham* v. *Richardson,* 403 U.S. 365 (1971)]; and to a limited extent, sex [*Frontiero* v. *Richardson,* 411 U.S. 677 (1973)].

Similarly, the employment sought in this case is not a "fundamental right," deprivation of which could be justified only by a compelling state interest. This Court has found that there is no "right" to a job or to appointment to a job. See *Board of Regents* v. *Roth,* 408 U.S. 564 (1972).

If the decision below is allowed to stand, a new category subject to the Court's strict scrutiny, will have been created.

Since the case at bar involves neither a suspect classification nor a fundamental right, the traditional or "restrained" standard of review should have been applied under the guidelines of *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61 (1911), as follows:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A *classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.* 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. 220 U.S. at pp. 78-79. (emphasis added.)

The petitioners' policy of denying employment to drug users was based on its concern for the safety of the riding public. Petitioners sought to employ persons able to function well in the routine and challenge of daily work, whether in operational or administrative positions. The

record below includes the testimony of medical experts challenging the efficacy of methadone maintenance programs, and in fact, the district court decision acknowledged that "there are differences of opinion as to the merits of methadone maintenance as a treatment for heroin addiction." *Beazer, supra,* 399 F. Supp. at p. 1058.

Clearly, then, this case does not involve the "invidious discrimination" which is necessary to a finding of unconstitutionality under the traditional standard of scrutiny. (See *Dandridge* v. *Williams,* 397 U.S. 471, 483 [1970].)

C. *The district court improperly applied the disparate impact test in finding that petitioners' employment policy violated Title VII of the Civil Rights Act of 1964 (42 USC 2000e).*

The Court of Appeals did not reach the question of Title VII jurisdiction and liability as applied to petitioners by the district court. Nevertheless, the district court opinion established an undesirable precedent which merits review by this Court.

The district court ruled that the petitioners' policy of excluding methadone maintained persons from employment had a disparate impact on Blacks and Hispanics and therefore constituted unlawful employment discrimination in violation of Title VII. The ruling was made for the express purpose of establishing jurisdiction for an award of attorneys fees. *Beazer, supra,* 414 F. Supp. at 278. The court found disparate impact solely on the basis of statistics purporting to show (1) that of the employees referred to petitioners' medical consultant "for suspected violation of its drug policy" (*Beazer, supra,* 414 F. Supp. at p. 278) 81% were Black and Hispanic and 19% were White; and (2) that between 62% and 65% of methadone

maintained persons in New York City are Black and Hispanic.

The first set of statistics is irrelevant in the context of this case, since it is not limited to methadone maintained persons nor does it indicate how many, if any, of the persons referred to the medical consultant, were discharged from employment.

The second set of statistics was not presented at the trial as hard data but merely as imprecise estimates by several of the respondents' witnesses. Moreover, the court disregarded the minimal nature of the impact on the relevant group, a threshold requirement for a finding of Title VII discrimination. *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1176 (1972) reversed on rehearing on other grounds, 534 F.2d 993 (1976) cert. den. 431 U.S. 965 (1977).

The court also disregarded the fact that 46% of petitioners' work force is Black and Hispanic. As stated in *United States* v. *Ironworkers*, 443 F.2d 544, 551, cert. denied 404 U.S. 984 (1971) the use of statistics must be "conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination." See also *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420. In the case at bar, there are no such supportive facts, the statistics themselves are of dubious validity, and the finding of discrimination is entirely unwarranted.

Moreover, recent decisions have cast doubt on the validity of the disparate impact standard in its application to a public agency. As cited by *Blake* v. *City of Los Angeles*, 435 F. Supp. 55 (D.C.D. Cal. 1977), the court in

Scott v. *City of Anniston*, 430 F. Supp. 508 (N.D. Ala. 1977) found,

> . . . the intent standard, i.e. that there must be proof of discriminatory racial purpose as in *Washington* v. *Davis*, should be applied in civil rights litigation brought under Title VII. . . . The Supreme Court held in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 96 S. Ct. 2666 (427 U.S. at 453, 96 S. Ct. at 2670), that the authority for the 1972 amendment extending Title VII to State and local governments was the Fourteenth Amendment. . . . Therefore, it is simple logic that a statute can be no broader than its Constitutional base. . . . It follows that in Title VII cases against a State or local government the statute is to be construed in accordance with the Constitutional test adopted by the Court in *Washington, supra*: i.e. there must be proof of discriminatory purpose. (*Scott* v. *City of Anniston*, 430 F. Supp. at 514-15; cited in *Blake* v. *City of Los Angeles*, 435 F. Supp. at 63-64.)

In the instant case the court below acknowledged that no discriminatory purpose was present. *Beazer, supra*, 414 F. Supp. 277, 279. Consequently, no support exists in this case for liability under Title VII.

III.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April, 1978

Appendices

APPENDIX A

Opinion and Judgment of the United States Court of Appeals, Second Circuit, Entered June 22, 1977

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CARL A. BEAZER *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

NEW YORK CITY TRANSIT AUTHORITY *et al.*,

Defendants-Appellants-Cross-Appellees.

Nos. 1043, 1309, Dockets 76-7295, 77-7092

Argued May 5, 1977

Decided June 22, 1977

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Robert B. Fiske, Jr., U. S. Atty., S. D. N. Y., New York City, Barbara Allen Babcock, Asst. Atty. Gen., Ronald R. Glancz, Robert S. Greenspan, Walter W. Barnett, Attys., Dept. of Justice, Washington, D. C., Sidney Edelman, Asst.

Gen. Counsel, Rockville, Md., Robert B. Lanman, Senior Atty., Dept. of Health, Education and Welfare, Washington, D. C., on brief for United States as amicus curiae urging affirmance of the appeal.

Before MANSFIELD and OAKES, Circuit Judges, and BRIEANT, District Judge.*

OAKES, Circuit Judge.

I.

In a comprehensive and carefully limited opinion, the United States District Court for the Southern District of New York, Thomas P. Griesa, Judge, held that the New York City Transit Authority's blanket exclusion from employment of all persons participating in or having successfully concluded methadone maintenance programs—the plaintiff class in this action brought under 42 U.S.C. § 1983—violated the equal protection and due process clauses of the Fourteenth Amendment. The court enjoined the Transit Authority (TA) from further enforcing its policy. 399 F.Supp. 1032 (S.D.N.Y. 1975). On appeal the TA does not challenge any of Judge Griesa's findings as factually erroneous, nor could it in view of the one-sided record before us. This record, developed over fifteen days of trial, overwhelmingly supports the trial court's findings that, after a brief initial period of adjustment, many former heroin addicts on methadone maintenance are employable and that identification of those who are employable is readily accomplished through regular personnel procedures.

The district court's conclusion of law was that the TA's methadone rule has "no rational relation to the demands

* Of the Southern District of New York, sitting by designation.

of the jobs to be performed." 399 F.Supp. at 1057. This conclusion rests on the solid foundation of *Sugarman* v. *Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973) (policy against employment of aliens unconstitutionally overinclusive), and our own *Crawford* v. *Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976) (policy requiring discharge of pregnant Marine unconstitutionally under- and overinclusive), as the United States as amicus curiae points out. *Accord, Cook* v. *Arentzen* No. 76-1359 (4th Cir. May 6, 1977). The decree is drawn strictly on the basis of the evidence and does not prevent the TA from making regulations to ensure that past or present methadone users are proven to be employable and to prevent their employment in safety-sensitive jobs. Accordingly, we affirm the district court's holding of a constitutional violation and its consequent injunction against further enforcement of the TA policy.

II.

In a supplemental opinion Judge Griesa also held that appellees were entitled to relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., because the TA methadone policy had a racially discriminatory effect. 414 F.Supp. 277 (S.D.N.Y. 1976). Appellees concededly pressed their Title VII claim for the sole purpose of obtaining attorneys' fees under 42 U.S.C. § 2000e-5(k), *see* 414 F.Supp. at 278, and the court did award such fees. We need not reach the Title VII issues in this case, however, because before the decree became final Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which permits the court in its discretion to allow a prevailing party in a § 1983 action, as here, "a reasonable attorney's fee as part of the costs." After passage

of this statute appellees moved for a declaration that it provided an alternative basis for the award of attorneys' fees in this case, and the district court so ruled. The court awarded to appellees a total fee of $375,000, of which $310,000 was compensation for hours worked, $14,290 was for costs incurred, and the balance was a "premium."

Judge Griesa was correct in holding that the 1976 Act authorized a fee award here, even though it was enacted after most of the services below were rendered. A change in the law is to be given effect in a pending case unless there is some indication to the contrary in the statute or its legislative history or unless manifest injustice would result. *Bradley* v. *School Board,* 416 U.S. 696, 711, 714-16, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); *Brown* v. *General Services Administration,* 507 F.2d 1300, 1305-06 (2d Cir. 1974), *aff'd on other grounds,* 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). Here the only reference in the legislative history explicitly supports the Act's application to pending cases, H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n. 6 (1976), and no manifest injustice from applying the statute to this pending case is alleged. Nor is any injustice alleged from the award of fees itself. Since a party who succeeds in enforcing his civil rights should ordinarily recover his attorneys' fees, unless special circumstances—not alleged here—render such recovery unjust, *see* S.Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976) *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912, *quoting Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *see also Northcross* v. *Board of Education,* 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (per curiam), the awarding of a fee under the 1976 Act was proper.

In addition to arguing against the awarding of any fee, however, appellants contend that the amount awarded was excessive. With regard to the sums awarded for hours worked and costs incurred, we uphold the district court. The requirements of documentation and an evidentiary hearing as to time charges, set forth in *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 464-74 (2d Cir. 1974), have been fully met here, and our decision in *Torres* v. *Sachs,* 538 F.2d 10 (2d Cir. 1976), permitted the district court to use "the same [fee award] standards as in other complex federal litigation," *id.* at 12, without regard to the nonprofit or "public interest" nature of the legal work done for appellees, *see id.* at 13. As to costs, they are frequently awarded by courts to successful parties, and no challenge is made to appellees' itemization here.

We must modify the district court's award, however, to the extent of eliminating the $50,710 awarded as a "premium." We take the view that this extra award amounted to an abuse of discretion in the particular circumstances of this case. Though complex factual issues were involved, the proof of which required diligent and rather prodigious effort, the legal issues were relatively simple and few. There was no dispute over the governing constitutional doctrines, although their applicability to the facts was a matter requiring considerable persuasive skill. Moreover, the benefits that the suit will bring to the plaintiff class are not altogether concrete. No monetary fund was recovered for the class (although back pay will be recovered by certain individual claimants); appellants are simply enjoined from continuing past policy. Only members of the class who (1) seek employment with the TA and (2) are not denied employment on legitimate grounds unconnected with methadone use will benefit from this litigation. These

two factors, complexity or risk of loss on the legal issues and benefit to the clients, are important considerations in any award of attorneys' fees above an hourly rate. *See City of Detroit* v. *Grinnell Corp., supra,* 495 F.2d at 470; *Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co.,* 481 F.2d 1045, 1050 (2d Cir.), *cert. denied,* 414 U.S. 1092, 94 S.Ct. 722, 38 L.Ed.2d 549 (1973); *Blank* v. *Talley Industries, Inc.,* 390 F.Supp. 1, 6 (S.D.N.Y. 1975); *Pealo* v. *Farmers Home Administration,* 412 F.Supp. 561, 567 (D.D.C. 1976). Since neither factor argues in favor of an extra award here, we must heed our own admonition to scrutinize attorneys' fee applications with an "eye to moderation," seeking to avoid either the reality or the appearance of awarding "'windfall fees.'" *City of Detroit* v. *Grinnell Corp., supra,* 495 F.2d at 469, 470. We reduce the award by $50,710 and otherwise affirm it.

III.

Cross-appellants Beazer, Reyes and Wright, three of the named plaintiffs in this class action, were denied individual relief—reinstatement and back pay—by the district court solely on the basis that, by being heroin users while working with the TA before their methadone treatment, they had violated a TA rule prohibiting heroin use. In each case, however, the TA's decision to discharge was not grounded on any violation of the heroin rule, but rather solely on use of methadone. Since this reason was unconstitutional, as above explicated, the court erred in denying individual relief.

The TA's argument against individual relief amounts to an attempt to evade the full force of the district court's holding. The TA first discharged the three employees for one reason and then years later, when that reason was held

to be illegal, it sought to avoid any remedy for its wrong by asserting other reasons, never before articulated, why the employees could have been discharged at an earlier time. In the case of such illegal discharges, the wrong done by the employer consists not of discharging the employee but of discharging him for an illegal reason. It is irrelevant to the consideration of a remedy for that wrong that the wrong might have been avoided by a discharge for a legal reason. *Cf. NLRB* v. *George J. Roberts & Sons, Inc.,* 451 F.2d 941, 945 (2d Cir. 1971) (if discharge of employee occurred even partially for motive that violated labor laws, he has suffered a remediable wrong, even if ample valid grounds existed for his discharge); *NLRB* v. *Pembeck Oil Corp.,* 404 F.2d 105, 109 (2d Cir. 1968) (same), *vacated on other grounds,* 395 U.S. 828, 89 S.Ct. 2125, 23 L.Ed.2d 737 (1969). The wrong being proven, the only question remaining is how best to make the discharged employee whole for the violation of his rights. *Cf. Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 763-64, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (remedies under Title VII of 1964 Civil Rights Act for victims of employment discrimination).

Certainly nothing in the record here indicates that the TA at the time of the methadone discharges considered alternatively discharging Beazer, Reyes, and Wright for violation of the heroin use rule. All indications are to the contrary, that the current assertions of the heroin use ground amount to "'counsel's *post hoc* rationalizations,'" *FPC* v. *Texaco, Inc.,* 417 U.S. 380, 397, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974), *quoting Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). As for other grounds on which the three individuals might have been discharged—such as Beazer's al-

leged poor attendance record—these were also not raised until after the district court had held the methadone ground unconstitutional. In any event, the district court examined the records and found these grounds insufficient, and if such a traditional employment problem arises after these three individuals are reinstated, that would provide an independent ground for a new discharge.

The remedies of hiring and back pay were ordered by the district court for two of the individual plaintiffs, and we affirm that holding as consistent with making those plaintiffs whole for the denial of their constitutional rights. We further believe that the same remedies should be ordered for Beazer, Reyes, and Wright, who are in essentially the same position as the other two in having lost or been denied employment for an illegal reason. We accordingly reverse the judgment as to these three plaintiffs and remand to the district court for a determination of the positions to which they should be reinstated and the amount of back pay due to them.

Judgment in accordance with opinion.

APPENDIX B

Opinion and Judgment of the United States Court of Appeals, Second Circuit, Entered February 1, 1978

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of February, one thousand nine hundred and seventy-eight.

76-7295
77-7092

CARL A. BEAZER, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

—v.—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
Defendants-Appellants-Cross-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants-cross-appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge
Irving R. Kaufman

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of February, one thousand nine hundred and seventy-eight.

Present:

HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
Circuit Judges.
HON. CHARLES L. BRIEANT,
District Judge.

76-7295,
77-7092

CARL A. BEAZER, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

—v.—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
Defendants-Appellants-Cross-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellants-cross-appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

APPENDIX C

Opinion and Judgment of the District Court of the Southern District of New York, Entered August 6, 1975

CARL A. BEAZER, *et al.*,
Plaintiffs,

—v.—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
Defendants.

No. 72 Civ. 5307.

UNITED STATES DISTRICT COURT, S. D. NEW YORK

Aug. 6, 1975.

Eric D. Balber, Mark C. Morril, Elizabeth B. DuBois, Legal Action Center for the City of New York, New York City, for plaintiffs.

Edward W. Summers, Brooklyn, N. Y., and Gilbert T. Dunn, of counsel, for Transit Auth.

A. Michael Weber, Brooklyn, N. Y., Asst. Corp. Counsel, for Civil Service Commission.

William A. Roskin, New York City, for Dept. of Personnel, Civil Service Commission.

OPINION

GRIESA, *District Judge.*

This is a class action against the New York City Transit Authority ("TA") and the Manhattan and Bronx Surface

Transit Operating Authority ("MABSTOA") and certain of their officials. For convenience, both of these entities will usually be referred to hereafter collectively as "the TA." Also sued are the New York City Civil Service Commission and the New York City Personnel Department and certain officials thereof.

The action challenges the blanket exclusion from any form of employment in the New York City subway and bus systems of all former heroin addicts participating in methadone maintenance programs, regardless of the individual merits of the employee or the applicant. Plaintiffs also allege that there is a similar exclusionary policy even against former heroin addicts who have successfully *concluded* their participation in a methadone program.

The amended complaint alleges that this policy violates the due process and equal protection clauses of the Fourteenth Amendment, and federal civil rights statutes, 42 U.S.C. §§ 1981 and 1983. The claim is that there is no legal basis for classifying all present and former methadone maintenance patients as unemployable for any position in the TA.

Plaintiffs also allege that the exclusionary policy has a disparate impact on blacks and Hispanics, resulting in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

Jurisdiction is invoked under 28 U.S.C. §§ 1331(a) and 1343(3) and (4), and also 42 U.S.C. §§ 2000e-5(f)(3).

Plaintiffs seek declaratory and injunctive relief on behalf of the class, and certain monetary relief on behalf of the named plaintiffs.

Parties

The Four Named Plaintiffs

Carl A. Beazer, a black, is 40 years old. Beazer started working for the TA in 1960 as a subway car cleaner. He was promoted to subway conductor in 1961, and was further promoted to towerman in 1966. Beazer was dismissed from his employment on November 26, 1971 after a heroin addiction problem came to light.

Beazer had been a heroin addict since about 1952. This addiction continued during virtually the entire time of his employment by the TA, lasting until May 1971, when he entered into the methadone maintenance program of the Veterans Administration. He has been a successful participant in the methadone maintenance program since that time. The uncontradicted evidence is that, like many new methadone patients, he experimented briefly with the resumption of heroin during the early days of his methadone treatment, but he has been entirely free of heroin or other illicit drug use for over three years. Beazer ceased using methadone in November 1973.

Following his dismissal from the TA, Beazer has been steadily employed—first as a counselor in the Detoxification Program of the Veterans Administration, then as a supervisor with the Addiction Research and Treatment Corp. (engaged in drug rehabilitation work) and now as a Division Chief with an organization known as Wildcat Services, which employs methadone patients to perform building maintenance work.

The TA's Impartial Disciplinary Review Board made a finding that Beazer was handling his job at the TA competently at the time of the termination proceedings, while he was participating in the methadone program. Beazer was

nevertheless terminated for violation of the TA's rule against narcotic usage.

Beazer's employment in his various positions since leaving the TA appears to have been in all respects satisfactory. Beazer was formerly married but is divorced.

Jose R. Reyes, an Hispanic, is 29 years old. Reyes was employed by the TA in 1968 as a Maintainer's Helper—Group B (Mason), and in 1970 was promoted to Ventilation and Drainage Maintainer. Reyes was dismissed on January 20, 1972, after a medical examination showed evidence of the use of methadone.

Reyes was a heroin user from about 1961 until February 1971, when he enrolled in a methadone maintenance program at St. Claire's Hospital. This program is under the supervision of the Beth Israel Medical Center. The uncontradicted evidence is that Reyes has been a satisfactory participant in the methadone maintenance program. Reyes is still maintained on methadone, although he is in the process of withdrawing.

Following his dismissal from the TA, Reyes was employed in the methadone maintenance program of Mount Sinai Hospital. At present he is a full-time student at Fordham University. Reyes is married and has two children.

Malcolm Frasier, a black, is 31 years old. In February 1971 Frasier applied for a position as a Bus Operator with MABSTOA, but was rejected because his driver's license had been suspended. Frasier applied for the same position again in early 1973. However, in March 1973, when Frasier reported for processing he disclosed that he was a methadone maintenance patient. He was therefore rejected for the position of Bus Operator. Frasier

also applied at about this time for the position of Bus Cleaner, but in April 1973 was rejected because of his former methadone use.

Frasier used heroin from about 1968 until his entry into the Mary Scranton Foundation methadone maintenance program in October 1972. He was a successful participant in this program, and terminated the use of methadone in March 1973.

From about 1964 to early 1974 Frasier was employed as a truck driver and a taxicab driver. Since early 1974 Frasier has been a shipping clerk for Baker, Knapp & Tubbs Furniture Co.

Francisco Diaz, an Hispanic, is 40 years old. In 1970 Diaz applied at the TA for the position of Maintainer's Helper—Group D (Sheet Metal). Diaz was rejected when he disclosed that he was a methadone maintenance patient.

Diaz was a heroin user commencing about 1950 until he entered the methadone maintenance program of Beth Israel Medical Center in December 1968. Diaz continues to participate in the methadone program.

Out of the four named plaintiffs, Diaz is the only one about whom any genuine question has been raised regarding his conduct while on the methadone program. Various clinical notes indicate suspicions of illicit narcotics use and alcohol use.

However, Diaz has a long record of stable employment. From 1962 until 1973 he was employed as a sheet metal worker. Since 1973 he has been employed as a helper in a commercial bakery. There is no indication of any deficiency in Diaz's performance in either job. Diaz is married and has a wife and children.

The Class

Basically the class represented by the named plaintiffs consists of all those persons who have been, or would in the future be, subject to dismissal or rejection as to employment by the TA on the ground of present or past participation in methadone maintenance programs.

At one point in the proceedings there was consideration as to whether the class should be expanded to cover former heroin addicts who had become drug-free without the use of methadone. However, it has been agreed by all parties, with the concurrence of the court, that the class should not include this latter group.

Defendants

The TA is a public benefit corporation organized under the laws of the State of New York. The TA operates the subway system of New York City and certain bus lines in the city.

MABSTOA is also a public benefit corporation organized under New York law, and is a subsidiary of the TA. It operates certain bus lines in New York City.

Defendant William J. Ronan was chairman of the TA and MABSTOA from March 1968 until May 1974.

Defendant David Yunich succeeded to the above positions in May 1974.

Defendants William L. Butcher, Lawrence R. Bailey, Harold L. Fisher, Constantine Sidamon-Eristoff, Donald H. Ellito, Edwin G. Michaelian and Mortimer Gleeson, along with defendant Yunich, constitute the total membership of the TA and the directors of MABSTOA.

Defendants Frederic B. Powers and William A. Shea were members of the TA and were directors of MABSTOA

at the time this action was originally filed, and were subsequently succeeded by defendants Michaelian and Sidamon-Eristoff.

Defendant Wilbur B. McLaren is Executive Officer in charge of labor relations and personnel for the TA.

Defendant Louis Lanzetta is Medical Director of the TA.

Also joined as defendants are the Civil Service Commission of the City of New York and the Personnel Department of the City of New York; Harry I. Bronstein, Chairman of the Civil Service Commission and Director of the Personnel Department; and David Stadtmauer and James W. Smith, members of the Civil Service Commission.

In the case of all individuals, the amended complaint names also their "successors in office."

Defendants' Policy Regarding Methadone

It is the general policy of the TA that no person using narcotic drugs may be employed. Rule 11(b) of the TA's Rules and Regulations provides:

> "(b) Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director—Chief Surgeon of the System."

Methadone is regarded as a narcotic within the meaning of Rule 11(b). It is stipulated that no written permission has ever been given by the Medical Director for the employment of a person using methadone.

The effect of this policy is that, if it is revealed that a current employee of the TA is a user of methadone, he will be discharged, or if an applicant for employment is a user of methadone, he will not be employed. This policy applies to all positions in the TA regardless of whether they are operating or nonoperating positions. Moreover, the policy operates as an absolute exclusion—no consideration being given to individual factors such as recent employment history, successful adherence to a methadone program, or evidence of freedom from heroin use.

The situation is not entirely clear with respect to the policy of the TA regarding persons who have successfully concluded participation in a methadone program. The reason that the policy is not fully crystalized is that the question has not arisen in practice to any appreciable extent. It is clear that a relatively recent methadone user would be subject to the blanket exclusionary policy. However, the TA has indicated that there might be some flexibility with respect to a person who had once used methadone, but had been free of such use for a period of five years or more. But even on this point, there is no official directive indicating that the person would be considered for employment.

The reasons given by the TA as a basis for this policy will be dealt with in detail later in this opinion. They can be summarized now as follows. Methadone maintenance, as a treatment for heroin addiction, has been developed relatively recently. The TA contends that the use of methadone in place of heroin is merely the substitution of one narcotic for another. The TA asserts that methadone maintenance treatment fails to a significant degree in remedying the basic problems of heroin addiction—with the result that a methadone maintenance patient embodies

the underlying character defects which caused him to turn to heroin in the first place, and that there is a substantial risk that such a person, while on methadone, will revert to heroin or turn to other drugs or alcohol abuse. The TA contends also that there are significant adverse physiological effects from methadone itself, which would impair the performance of such person as an employee even if he faithfully refrained from heroin or other illicit drugs or alcohol abuse. The TA further contends that its operations involve such serious problems of safety, both with respect to the public and to the employees, that they cannot prudently employ present or past methadone patients. Finally, the TA argues that there is no satisfactory way of screening the reliable methadone patient from the unreliable, so that it is administratively necessary to have a blanket exclusionary policy.

Summary of Conclusions

I have concluded that the blanket exclusionary policy of the TA against methadone maintenance patients is constitutionally invalid. Plaintiffs have more than sustained their burden of proving that there are substantial numbers of persons on methadone maintenance who are as fit for employment as other comparable persons.

No one can have the slightest doubt about the heavy responsibilities of the TA to the public, including their duty respecting the safety of millions of persons who are carried on its subways and buses. However, in my view, the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

I have concluded that the policy is the result of a misunderstanding by the TA regarding the nature and effects

of methadone maintenance. I do not say this in any spirit of criticism. The information about methadone maintenance in the public domain is all too fragmentary and confusing. Myths and misconceptions abound. On the other hand, the trial of this case has afforded a unique opportunity to explore in depth the somewhat controversial issues surrounding methadone. A balanced and realistic view of the subject is possible as a result.

I should note that after about six days of trial the parties advised me that they were virtually finished with the presentation of their evidence. However, I was concerned about what appeared to be a disproportionately one-sided array of proof. Plaintiffs had introduced the testimony of an impressive group of experts, corroborated by laboratory and other tests, to the effect that a former heroin addict properly "stabilized" on methadone is free of undesirable narcotic effects and is entirely normal as regards mental and physical capabilities. The evidence demonstrated that methadone maintained persons were successfully employed in jobs of many kinds.

As against this, the TA had brought forward a single expert witness, a pharmacologist, to present theories about certain adverse characteristics of methadone. However, the knowledge and experience of this witness regarding methadone maintenance were so limited that his testimony was of little value. The TA called its personnel director and medical director, who both testified to certain theories they held regarding methadone maintenance. However, these officials naturally lacked the depth of expertise possessed by plaintiffs' witnesses on this subject.

The situation raised a serious question as to whether all sides of the problems involved in the case had been thoroughly explored, or whether any negative aspects of

methadone and methadone maintenance programs existed that had not been presented. I therefore requested the attorneys for the parties to submit proposals for further witnesses. The result was an additional nine days of trial at which exhaustive effort was made to probe the relevant questions with experts of varying points of view.

The picture which emerges from all the evidence is basically this. There are some 40,000 persons in New York City on methadone maintenance. It is, at present, the most widely used method for rehabilitating heroin addicts. Among these 40,000 persons on methadone maintenance there is a great variation (as there is in the population as a whole) with regard to characteristics such as educational qualifications, employment skills and background, anti-social behavior, alcohol usage, and abuse of illicit drugs. But the crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged—that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically. It is further proved beyond any real dispute that among the 40,000 persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs; that such persons are capable of employment and many are indeed employed. It is further clear that the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees. Finally, it has been demonstrated that the TA has ways of monitoring employees after they have been hired, which can be used

for persons on methadone maintenance just as they are used for other persons employed by the TA.

This proof applies with equal, if not greater, force to those former heroin addicts who have successfully completed participation in a methadone program.

I have therefore concluded that the present blanket exclusionary policy of the TA against employing, or considering for employment, any past or present methadone maintained person regardless of his individual merits, is unconstitutional.

Facts

Heroin

It will be important to understand the differences between methadone and heroin.

Heroin is a narcotic which is generally injected into the bloodstream by a needle. It is a central nervous system depressant. The usual effect is to create a "high"—euphoria, drowsiness—for about thirty minutes, which then tapers off over a period of about three or four hours. At the end of this time the heroin user experiences sickness and discomfort known as "withdrawal symptoms." There is intense craving for another shot of heroin, after which the cycle starts over again. A typical addict will inject heroin several times a day.

There are variations in the severity of heroin addiction. For instance, it is possible for a heroin addict to take moderate amounts of the drug—just enough to avoid the withdrawal symptoms, without producing the euphoric highs. Such a person might function somewhat normally. However, this type of controlled heroin addict is very rare.

Methadone

Methadone is a synthetic narcotic and a central nervous system depressant. If injected into the bloodstream with a needle, it can produce basically the same effects as heroin.

Methadone has been used, under medical controls, as a pain killer. Also, methadone is used in "detoxification units" of hospitals to take addicts off of heroin. This is done by switching a heroin addict to methadone and gradually reducing the doses of methadone to zero over a period of about three weeks. The patient thus detoxified is drug free. Moreover, it is hoped that the program of gradually reduced doses of methadone leaves him without the withdrawal symptoms, or the "physical dependence" on a narcotic.

It appears that these detoxification programs, without a follow-up of further treatment are frequently unsuccessful, and that there is a high incidence of reversion to heroin. There are various theories about why this is so. Persons involved in programs such as Phoenix House and Odyssey House take the view that the reason that "physical" detoxification is not enough is because the underlying causes of heroin addiction are psychological problems and problems of life-style, which must be addressed in an appropriate manner.

On the other hand, there is a body of opinion which holds that, in addition to psychological and life-style problems, there are some physical problems from heroin addiction which persist after any short-run detoxification. This theory is that there is a physical discomfort or a physical dependence, which requires treatment. The major treatment method thus far devised is maintenance on stable doses of methadone. Such methadone maintenance is

feasible because of the following characteristics of methadone.

We are dealing here with methadone taken orally. When taken orally, methadone is radically different from heroin. Whereas heroin moves rapidly in and out of the bloodstream causing violent highs and lows, oral methadone passes into the body tissues, and then is fed into the bloodstream gradually over a period of twenty-four hours or more. There is a relatively constant or stable level of methadone in the blood during this time. When a person is first on oral methadone he may experience narcotic effect in some degree—such as euphoria, and drowsiness. But it has been found that the body will become tolerant to oral methadone rather quickly, and that after this tolerance is achieved, any narcotic effect ceases. The evidence is that a person who has attained this tolerance can take a constant dose of methadone once a day and has neither the euphoric effects nor the withdrawal symptoms associated with heroin.

The question arises as to what purpose there is in taking methadone if no euphoria or pleasurable effects are obtained. According to the expert evidence, the purpose is two-fold: *First,* methadone produces what is called a "blockade" or "cross-tolerance," which prevents a methadone user from experencing any "high" from injecting heroin. It should be noted that this cross-tolerance does not apply when the methadone user attempts to use substances other than heroin—such as cocaine, barbiturates, amphetamines, or alcohol. *Second,* experience indicates that former heroin addicts may have some symptoms of discomfort or drug dependence for a fairly long period of time after discontinuing the use of heroin. The nature of these symptoms obviously varies to some extent from

individual to individual. The precise cause of such symptoms is a matter of some debate—as to whether the cause is physical or psychological or a combination of both. These matters do not require a detailed exploration in this opinion. The evidence convinces me that the symptoms we are talking about are what would generally be considered medical or physical symptoms. Clearly they are not, in and of themselves, mental or psychiatric deficiencies or disorders. In any event, the uncontradicted evidence is that these symptoms are cured by stable dosage of methadone.

Origin of Methadone Maintenance Programs

It is well known that methadone maintenance, as a treatment for heroin addiction, originated with Dr. Vincent Dole and his wife, Dr. Marie Nyswander, at Rockefeller University. Dr. Dole testified in this case.

In 1963 Dr. Dole became Chairman of the New York City Health Department's Health Research Committee on narcotics, and entered into an intense research activity regarding narcotics. One of his projects was to determine if narcotics addicts could be stabilized on medically controlled doses of drugs. In other words, could the radical highs and lows be eliminated by some constant dosage of a drug? He found that this was impossible with short-acting injectible drugs such as heroin and morphine. However, the results were radically different when he tried oral methadone. Drs. Dole and Nyswander found through their experiments that heroin addicts could become stabilized on constant doses of methadone with the results described earlier in this opinion.

A demonstration methadone maintenance program was set up at the Beth Israel Medical Center. Twelve patients

were admitted in the first group and by 1965 about 200 patients were being treated. At this time, Dr. Harold R. Trigg, who was head of the Narcotics Detoxification Service at Beth Israel, became interested in the methadone maintenance project. Dr. Trigg later became, and still is, Chief of the Methadone Maintenance Program of the Beth Israel Medical Center. At the present time Beth Israel treats about 6500 persons on methadone maintenance in 35 separate clinics. Dr. Trigg testified in this case.

As indicated earlier in this opinion, there is substantial agreement that many persons attempting to overcome heroin addiction have psychological or life-style problems which reach beyond what can be cured by the physical taking of doses of methadone. Dr. Dole and his associates were acutely aware of this. Consequently the pattern which was developed in the Beth Israel program and in methadone maintenance programs subsequently established was to provide a variety of services including counseling, medical and psychiatric care, educational and vocational guidance, and recreational facilities. Certain minimum standards with respect to these services are set forth by both federal and state regulations.

Current Methadone Maintenance Programs

Today there are approximately 75,000 persons under methadone maintenance treatment in the United States, of which about 40,000 are in New York City.

The methadone maintenance programs are of two basic types. The first type is referred to as "public" or "semi-public." These programs are non-profit. The second type is referred to as "private." These programs are operated for profit.

The five major public or semi-public methadone maintenance programs in New York City are:

(1) The Beth Israel program, referred to above, with 35 clinics treating 7100 patients;[1]

(2) A program administered by the City of New York with 39 clinics treating 12,400 patients (hereafter referred to as "the City program");

(3) A program administered by the Bronx State Hospital and the Albert Einstein College of Medicine, with 7 clinics treating about 2400 patients;

(4) A program operated by the Addiction Research and Treatment Center (ARTC) with 6 clinics treating about 1200 patients; and

(5) A program operated by the New York State Drug Abuse Control Commission (DACC), with 8 clinics treating about 1100 patients.

The total number of patients treated in public or semi-public programs is about 26,000. It appears that these programs are financed almost entirely by federal, state and city funds.

There are about 25 private programs in New York City treating a total of about 14,000 patients.

All methadone maintenance programs throughout the United States are required to comply with regulations of the Food and Drug Administration, promulgated December 15, 1972, 21 C.F.R. § 130, *et seq.* Programs in New York State are required to comply, in addition, with the somewhat

[1] The figures given in this section are from the testimony of Dr. Frances Gearing, of the Columbia University School of Public Health. These figures are as of December 31, 1974.

more stringent regulations of the New York Drug Abuse Control Commission, promulgated in May 1974, 14 N.Y.C. R.R., Part 2021.

Compliance with these regulations is monitored by the DACC, which acts on behalf of the state and also on behalf of the federal government by contract.

Both the federal and state regulations set forth requirements for the types of persons who can be admitted to the program, the kinds of services which must be rendered, the staffing of the programs, the days and hours of operation and record keeping, controls on the administration of methadone, and tests for illicit drug usage.

A number of the clinics under the aegis of both the Beth Israel and the City programs are located in hospitals not operated either by the City or by Beth Israel. These arrangements are pursuant to contract. The standards for the clinics are set by Beth Israel and the City. The hospitals provide facilities and assist in various ways such as consultation in the hiring of personnel. Fourteen of the Beth Israel clinics and 36 of the City clinics are operated in this way. Among the hospitals where City methadone maintenance clinics are located are New York Hospital, Knickerbocker Hospital, Harlem Hospital, Bellevue Hospital, Elmhurst Hospital and Beekman Downtown Hospital.

The Course of Methadone Maintenance Treatment

In order to become enrolled in a methadone program, a person is supposed to have been a heroin addict for at least two years. In other words, the sole purpose of these programs is for the cure of heroin addiction.

When an applicant is accepted for a program, the first step is to have him detoxified from heroin and from any other illicit drug abuse or alcohol abuse. For this purpose

a short period of in-patient treatment at a hospital is usually required.

In connection with this process, a stable or constant dosage of methadone is worked out to be administered to the patient over a protracted period of time. Among methadone maintenance programs there are basically two theories regarding maintenance on stable doses. There are what are termed "high dose" programs, where the dosage is in the range of 80-100 milligrams per dose. Beth Israel is a high dose program. The philosophy of such programs is to give the patient sufficient methadone to make sure that any physical dependence or craving for heroin will be eliminated and to make sure that the blockade or cross-tolerance against heroin is effective. The proponents of such programs further believe that there should be no pressure upon methadone patients to discontinue methadone; that there is nothing intrinsically wrong or harmful about the usage of methadone over an indefinite period of time; that such usage is essentially medicinal; and that the sole criterion which should be used to determine whether or not the patient should be on methadone is his ability to function properly in society.

The "low dose" programs have a somewhat different philosophy. Their proponents believe that the proper goal for a methadone maintenance program should be to have the patient on the program as short a time as possible, that the proper goal of a methadone maintenance program should be detoxification not only from heroin, but also from methadone. They believe that detoxification from low doses of methadone is easier than from high doses, and thus favor the low doses. Addiction Research and Treatment Corp., which has clinics in Brooklyn and Harlem, conducts a low dose program.

However, except for the differences noted above, the basic functioning of the high dose and low dose programs is similar. After detoxification from illicit drug abuse, the patient commences taking constant doses of methadone each day. Under federal and state regulations, a patient is required to appear at the clinic and take his dosage of methadone in the presence of a staff member at least six six days a week for the first three months. The seventh day's dose may be taken at home. After a certain period of time, if the patient's conduct is satisfactory, he may be permitted to reduce his attendance at the clinic and take more of his daily doses at home. However, even after two years of participation in a program, the patient is required to make a minimum of two visits to the clinic each week.

The patient must participate in counseling—at first on a daily basis, and less frequently as time goes on.

The patient must be observed in various ways to determine whether he is abusing drugs or alcohol. It appears that methadone patients, at least in the first stages of treatment, sometimes attempt to return to heroin. But the uncontradicted evidence is that the blockade or cross-tolerance is indeed effective, and that persons on methadone are no longer able to find satisfaction in heroin; and then generally stop trying. However, for one reason or another, such as a possible lapse in methadone dosage, a patient might occasionally revert to heroin in a serious fashion. In any event, urine tests for heroin usage are required by federal and state regulations to be administered at least once a week.

The evidence further shows that, by the use of a somewhat different chemical analysis, a urine test will reveal other drugs such as barbiturates, and amphetamines, although detection of cocaine is difficult. Federal regulations require urine tests once a month for evidence of drugs other than heroin. It further appears that clinics such as Beth Israel take steps to make sure that their patients are frequently observed to determine whether there is any drug abuse revealed by behavior or appearance. These clinics also watch closely for signs of excess drinking.

These clinics also take precautions against abuse of methadone. One problem is the possibility that a patient may take excessive quantities of methadone, over and above the dose prescribed by the clinic. It is conceivable that he might do this by obtaining methadone on the black market, or by taking two or three days' doses at one time where the clinic has given him methadone to be administered outside the clinic. A different type of problem is the possibility that a methadone patient might sell his methadone outside the clinic, instead of taking it himself.

Various precautions are taken to guard against either type of abuse—including strict control of the issuance of methadone doses, observations of the behavior of the patients, and observation of any signs of manipulation (*i.e.*, stories by the patient of losing his methadone, etc.).

It appears that during the first few months that a patient is on a methadone maintenance program, it will become reasonably apparent whether he is genuinely determined to rid himself of illicit drug usage and is conducting himself accordingly. There is a certain proportion of methadone maintenance patients who do *not* thus conform—who are showing evidence of illicit drug use of excessive drinking, who make little or no attempt at rehabilitation, who loiter or otherwise engage in undesirable conduct. These are what those experienced in the field call the "visible" cases. Many of them drop out of the programs

within the first few months or the first year. Many of them are discharged. In some cases such patients are kept on in the hope of improvement. But their situation is evident to clinic personnel. As far as employment is concerned, the evidence indicates convincingly that the clinic personnel are not likely to refer or recommend such persons.

For patients who do perform satisfactorily on the program, treatment will generally continue a year or more. The longest term of methadone maintenance treatment revealed in the record in the present case is four years. Often however, the patient reaches a point where he desires to terminate his usage of methadone. He believes that he can do without it, and wishes to avoid the trouble of frequent appearances at the clinic. In such a case, the dosage of methadone is reduced to zero over a period of time. Many patients, after terminating usage of methadone, function normally without it. Some find that they return to methadone maintenance.

Physical Effects of Methadone

Two basic questions arise with respect to the employability of methadone maintenance patients. The first is whether methadone maintenance patients will have any narcotic effects or other side effects related to the usage of methadone. The second is whether the patient will return to heroin, or will abuse other illicit drugs or alcohol. Both of these questions have been referred to in earlier portions of this opinion. However, they merit further discussion.

As an initial proposition, one might assume that methadone, being a narcotic and a central nervous system depressant such as heroin, must inevitably produce narcotic effects such as euphoria, drowsiness, inattention, departure from reality, and slowing of reactions.

The TA's expert witness, Dr. Vincent Lynch, a pharmacologist, testified that methadone "undoubtedly" occupies parts of the brain which would affect "cognitive faculties, the ability to respond voluntarily in certain situations." Dr. Lynch also testified that even in a person who has been maintained on a stable dose of methadone for a period of time, the person's functions would be inhibited for a short period of time each day after taking his dose of methadone. Dr. Lynch disputed the idea that a methadone patient could really be "stabilized" on a constant dose. His opinion was that a tolerance would be attained which would make methadone ineffective to prevent the discomfort or physical dependence causing the heroin craving.

Considering Dr. Lynch's testimony in the light of the evidence as a whole, I find Dr. Lynch's testimony to be too speculative to be of much value. For instance, Dr. Lynch's methadone "tolerance" theory was not based on any tests with human beings, and appears to ignore the marked differences between methadone and other drugs such as heroin.

The overwhelming weight of the evidence is to the effect that a methadone maintenance patient can perform normally, and that undesirable side effects are lacking.

It appears that during the twelve years that have elapsed since the initial investigations of methadone maintenance, there has been a remarkably intensive effort to test and observe methadone maintenance patients and to gather statistics about their performance. Dr. Robert DuPont, Jr., Director of the Special Action Office of Drug Abuse Prevention in The White House, and Di-

rector of the National Institute on Drug Abuse in the Department of Health, Education and Welfare, testified that there had been a "vast array of tests" regarding the ability to drive vehicles, ability to maneuver the hands, reaction to signals, sleep patterns, sexuality, and that the evidence is "that the person who is maintained on methadone performs within the normal range of expectation of a normal population."

The detailed results of a number of such tests were introduced into evidence in this action, and indicated normal behavior by methadone maintenance patients.

Dr. Vincent Dole testified regarding his many years of observation of persons stabilized on methadone, and stated:

> "Q. Doctor, has your physiological research or that of your colleagues indicated that there is any disruption of the cognitive faculties when a person is maintained on methadone?
>
> "A. No. On the contrary, we have much data by now that the cognitive and other emotional and intellectual faculties of the mind are normal. We have done the types of tests that you already probably had reported through Dr. Gordon's laboratory on specific things such as IQ measurements and various other perceptual tasks. What probably is more important to this point is now a very large record with some tens of thousands of patients who have gone to school and had high grades, who have accomplished much in responsible jobs, in business and elsewhere."

Regarding the possibility of a methadone maintenance patient obtaining heroin-type euphoria, Dr. Dole testified that many patients have come into methadone treatment

centers "on the mistaken theory that they were going to get a free ride and a free euphoria for a long time" and that such patients have very soon discovered "that they do not get euphoria."

Dr. Paul Cushman, Jr., Director of the Methadone Maintenance Clinic of St. Luke's Hospital (a clinic operated under the direction of the Beth Israel Medical Center) testified that he had seen thousands of methadone maintenance patients and that they are basically "indistinguishable" from "comparable non-drug people." Dr. Cushman testified that as to characteristics such as alertness, ability to handle challenges, ability to perform work such as electrical circuit work, welding, mechanical repairs, and so forth—there is "no difference between a normal subject and the methadone maintained patient after he has been stabilized on his methadone."

Dr. Irving Lukoff, of the Addiction Research and Treatment Corporation, has been performing research for some years with respect to the results of methadone maintenance. Dr. Lukoff contributed much of the factual material for an article entitled "Methadone, The Forlorn Hope" by Edward J. Epstein in the Summer 1974 issue of The Public Interest. This article raised a number of questions about methadone maintenance, including the problem that many persons who commence maintenance programs drop out or are discharged.[2] For purposes of the present case,

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[2] Methadone maintenance has received both criticism and commendation in articles, books—and an occasional television item. The Epstein article questions certain of the medical theories espoused by Dr. Dole and his associates and questions certain statistics sometimes used to show the favorable results of methadone maintenance. For instance, the Epstein article cites certain "evidence" and authorities against the "blockade" theory of methadone.

Of course, my findings and conclusions in the present case must rest on the testimony and other evidence introduced in

the important point is that persons who remain in a methadone maintenance program for a substantial period of time are the result of a "self-cleansing" process which goes on in the program, according to Dr. Lukoff. Dr. Lukoff testified that he has seen hundreds of patients maintained on methadone who function normally in terms of all obvious signs, and that they are "functioning the way everybody else does."

Dr. Seymour Joseph, Deputy Commissioner of the New York State Drug Abuse Control Commission, testified that when a person is stabilized on methadone there are no deficiencies in day-to-day conduct such as ability to think and perform required functions.

Dr. Joyce Lowinson, who was responsible for the first methadone maintenance unit under Dr. Vincent Dole, and since 1968 has been in charge of the methadone maintenance program at Bronx State Hospital, testified that participants who are stabilized on methadone function normally, and that there is "no way of distinguishing a person on methadone from a person who is not on methadone" except by means of a urine or blood test revealing the presence of the substance. In contrast to Dr. Lynch's testimony that a person stabilized on methadone will feel a narcotic effect for a period of time immediately after taking his daily dose, Dr. Lowinson testified that such a

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the case, rather than on the views of authors expressed in articles, where these authors would not be subject to cross-examination about the extent of their knowledge, etc. But I would note a statement quoted with approval in the Epstein article by Dr. Avram Goldstein, director of the Addiction Research Laboratory at Stanford:

> "Nothing I have said should be interpreted as 'debunking' methadone or derogating its importance. It is a fantastically effective tool for bringing addicts into a new and helpful kind of therapeutic environment."

person, when he takes the daily dose of methadone, "is in no way changed, and is no different after he has taken his medication." Dr. Lowinson contrasted the taking of the dose of methadone with what results from the injection of heroin where there is the immediate "rush" or "high."

There was also considerable evidence on the question of whether methadone maintenance produces undesirable "side effects." The evidence is that, during the time patients are being brought up to their constant dosage of methadone (a period of about six weeks), there may be complaints of drowsiness, insomnia, excess sweating, constipation, and perhaps some other symptoms. After the patient is stabilized, he becomes tolerant to methadone and side effects diminish and largely disappear. However, some side effects may persist. For instance, in a group of methadone maintenance patients studied by Dr. Mary Kreek of Rockefeller University, 48% were experiencing excessive sweating; 17% had constipation; 16% had insomnia; 22% had some libido problem. However, the evidence is clear that these conditions do not particularly differentiate this group from other parts of the population. Moreover, except in rare cases, such conditions have no effect upon employability. For instance, the constipation problems could be cured by a common laxative.

The TA referred at the trial to a "package insert" which is required by FDA regulations to be included with methadone sold to physicians, hospitals, and clinics. The package insert contains a description of various matters, including warnings about possible side effects. The package insert states in part:

> *"Use in Ambulatory Patients*—Methadone may impair the mental and/or physical abilities required for

the performance of potentially hazardous tasks, such as driving a car or operating machinery. The patient should be cautioned accordingly.

"Methadone, like other narcotics may produce orthostatic hypotension in ambulatory patients."

There was extensive inquiry at the trial about the significance of this warning, justifying in my view, the following findings: Warnings in package inserts such as this one tend to include every *possible* adverse effect that might occur under *any* circumstances of usage. Although the side effects referred to in this warning might occur where methadone is being used as a pain killer or for some similar purpose, such effects do not occur in a person stabilized on a constant dose of methadone.

To summarize my conclusions on the subject, I find that a person maintained on a constant dose of methadone can perform normally by every standard that relates to employability, and that, except in rare cases, there are no side effects making such a person incapable of being employed. These, of course, are propositions which plaintiffs have consistently espoused. They have been tested in every way that the participants of this trial could think to test them. The overwhelming weight of the evidence is in their support.

Illicit Drug and Alcohol Abuse

A prospective employer of a methadone maintenance patient would naturally question the chances that such a person would revert to heroin, or use other illicit drugs. One aspect of the problem is the possibility that the methadone maintenance patient, unable to find further satisfaction in heroin, might substitute other drugs or alcohol.

The TA contends that there are risks of large proportions among methadone maintenance patients. The TA relies on a study performed by Chambers and Taylor in 1970 to the effect that, in a group of methadone patients in Philadelphia who had been under treatment for at least 24 months, 97.6% of them were found to use an illicit drug at least once during a one-month period. The TA relies on the testimony of Dr. Mitchell S. Rosenthal, director of Phoenix House, which operates a "drug free" program for the treatment of narcotic addicts—*i.e.,* no methadone or other drug is used following the initial detoxification. In the opinion of Dr. Rosenthal, "cheating" by methadone maintenance patients with illicit drugs had been shown by studies to be in the magnitude of 70%. The only specific study Dr. Rosenthal was able to refer to was the one by Chambers and Taylor.

On the other hand, Dr. Rosenthal testified that a patient in a methadone maintenance clinic is monitored so that his use or non-use of drugs can be detected by an employer in a way that does not exist for other employees who might be abusing drugs.

Plaintiffs presented evidence that the conditions under which the Chambers and Taylor study was performed bore no resemblance to the conditions that exist today in a properly conducted methadone maintenance program. Moreover, plaintiffs presented statistics and estimates indicating that the use of illicit drugs among methadone maintenance patients involves a relatively small, and generally visible, minority.

Before going into plaintiffs' evidence on this point, certain observations are necessary. Although fairly detailed information was presented about the major public methadone maintenance programs, very little specific in-

formation was provided regarding the private clinics. Obviously, neither side wished to prolong the case to the extent of subpoenaing witnesses from all, or even some, of the 25 private clinics in New York City. There was general testimony to the effect that the private clinics might tend not to be as well run as the public programs. There was also testimony indicating that the quality and performance of the patients in private clinics might be worse than that of patients in the public programs, although the director of one of the public programs, ARTC, testified that ARTC draws from the hardest of the hard core addicts. The information about the private clinics is not really sufficient to permit a conclusion that statistics about matters such as drug abuse would be either better or worse for the private clinics than for the public programs.

In any event, since the public programs treat about 26,000 out of the 40,000 methadone patients in New York City, statistics and other information drawn from these public clinics cover the majority of methadone maintenance patients in New York City, and will be relied upon with this in view.

The public clinics appear to be conscientious in accumulating information about drug abuse. They also note instances of problem drinking. In the case of drugs, this information comes from the periodic urine tests. With regard to drinking, it appears that the program personnel are trained to be sensitive to signs of such a problem.

The witnesses in this case basically agreed that methadone maintenance patients will sometimes attempt to "challenge" their methadone—*i.e.*, attempt some usage of heroin. This usually happens during the first weeks on a program,

although it can also happen later. Plaintiffs' witnesses were emphatic in their view that these attempts by a person stabilized on methadone to return to heroin fail because of the blockade or cross-tolerance effect. For instance, Dr. Beny J. Primm, Executive Director of ARTC testified:

> "... a patient who is on methadone would have no reason whatsoever, once stabilized, to again shoot heroin. I want that absolutely clear. It is just pharmacologically impossible for him to realize any feelings from the heroin because of the cross tolerance of methadone and heroin."

However, this blockade or cross tolerance effect does not relate to drugs other than heroin, or to alcohol.

Dr. Trigg of Beth Israel testified that about 5,000 out of the 6,500-7,000 patients in his clinics have been on methadone maintenance for a year or more. He further testified that 75% of this 5,000 are free from illicit drug use.

Dr. Bihari of the City's methadone maintenance program testified that, for patients who have been in that program more than six months only 4% have signs of heroin usage in urine tests, and 11% have signs of other drugs. Dr. Bihari testified that 6% of the City's patients have alcohol problems.

Dr. Lowinson of the Bronx State Hospital program stated that, for patients who have been in that program six months or more, 6-7% show some evidence of heroin usage in urine tests, and another 12% show evidence of usage of barbiturates or other sedative or hypnotic drugs. Dr. Lowinson testified that 5% of the patients have alcohol problems.

Dr. Primm of ARTC testified that, among his program's patients who have been in treatment a year or more, 60-70% are adjusted sufficiently that they are free from any drug or alcohol problem. Dr. Primm testified that his program's patients are drawn from the "hardest of the hard core" addicts.

Dr. Kreek testified about a study relating to 129 of the first patients in methadone maintenance programs. At the time of the study these patients had been in programs from three to about five years. There was evidence of continued intermittent heroin abuse in the case of 2 out of the 129. There was evidence of intermittent use of other drugs in the case of 6 out of the 129, but these other drugs included barbiturates and valium. Dr. Kreek noted that valium is the second most frequently used drug by the general population—second only to aspirin. There was no indication of any cocaine use among the 129.

I conclude from all the evidence that the strong majority of methadone maintained persons are successful, at least after the initial period of adjustment, in keeping themselves free of the use of heroin, other illicit drugs, and problem drinking.

Employment

There is impressive evidence about successful employment among methadone maintenance patients. Seventy percent of the Beth Israel patients who have been in the program for a "period of time" are employed. Sixty percent of those who have been in the Bronx State Hospital program over a year are employed. In the City program, 45% are employed in paying jobs, 11% are homemakers, and 6% are full-time students. Dr. Primm of ARTC, testified that 35% of his program's total population (including those in the methadone program and those in a drug free program) are employed. The percentage is greater for the methadone program alone. In the DACC program, 80% are employed.

A statistical study by Dr. Frances Gearing of the Columbia University School of Public Health shows that for four groups of patients studied, the percentage occupied in gainful employment, homemaking, or school attendance after one year were 59%, 63%, 41% and 34% respectively.

Consolidated Edison hires methadone maintenance patients. The policy of Consolidated Edison is to consider for employment a former heroin addict who has performed satisfactorily on a methadone maintenance program for a minimum of one year. Con Ed has hired about 100 former addicts under this policy. Such employees have satisfactorily occupied a variety of positions at Con Ed including monitoring various types of controls, and work on street crews. Con Ed advances such employees along normal promotional lines in accordance with their performance skills, the sole exception being that former addicts are excluded from any nuclear facility in accordance with Con Ed's understanding of the law. Con Ed believes that its experience with former addicts participating in rehabilitation programs has been successful. A special study of the work of 13 Beth Israel patients at Con Ed indicates that their performance was as good or better than that of the average Con Ed employee.

The evidence further indicates that methadone maintenance patients have been satisfactorily employed as sheet metal workers, truck drivers, taxi drivers, drill press operators, teachers, electricians, mechanics, draftsmen, clerks, cashiers, bank tellers, and a great variety of other

positions. Local employers who are now hiring methadone maintenance patients at least on a trial basis are Chemical Bank, New York Life, Metropolitan Life, J. C. Penney, McGraw-Hill, Seagram, Columbia Presbyterian Hospital, New York Telephone Company, New York Off-Track Betting Corporation, and others. An official of the Sheetmetal Workers International Association testified that his organization is bringing methadone maintenance patients into its apprenticeship program, and that they are performing work such as welding, using heavy machinery, and working on scaffolding.

Dr. Joseph testified that there is a large segment of methadone maintenance patients who become "non-visible", in that they are performing well and are free of serious problems. With regard to employment, he testified:

> "We have people in methadone maintenance programs who are performing any and every type of service in this city and state, ranging from being outstanding members of the profession to laborers, going through the gamut of electricians—you name it."

According to Dr. Joseph there are thousands of such persons.

Classification of Persons on Methadone Maintenance

There is certain other information in the record which helps give perspective on the question of employability of persons on methadone maintenance.

The witnesses from the Beth Israel program testified that about one-third of the patients in that program, after a short period of adjustment, need very little more than the doses of methadone. The persons in this category

are situated fairly satisfactorily with respect to matters such as family ties, education and jobs. Another one-third of the patients at Beth Israel need a moderate amount of rehabilitation service, including vocational assistance, for a period of several months or about a year. A person in this category may, for instance, have finished high school, but may have a long heroin history and no employment record. A final one-third of the patients at Beth Israel need intensive supportive services, are performing in the program marginally, and either will be discharged or will be on the brink of discharge.

Dr. Harvey Gollance estimated that about 20% of Beth Israel's patients drop out of the program. At the Bronx State Hospital 10% of the patients are discharged during the first year.

Dr. Lukoff from ARTC described it this way. He stated that about one-third of ARTC's patients are "stereotype" addicts, who have started on heroin in their teens, and have had severe problems with family ties, education and crime. The other two-thirds of the ARTC patients are persons who started on heroin in their 20's, who tend to have finished school or military service, and who have maintained better situations with respect to family ties and employment. About 40-45% of the first third drop out in the first year of treatment. About 75-80% of the other two-thirds remain in the program.

The evidence indicates that problem patients—those who are abusing drugs or alcohol and who are not making progress in rehabilitation—are identifiable after about 3-6 months, if not sooner.

On the question of employability—many methadone patients (about 30% in the case of Beth Israel and Bronx State) are employed when they enter the programs. Others

are employed within a matter of weeks. In many cases, however, the clinic personnel feel that they should wait 6-9 months or even a year before making a recommendation for employment.

Identification of Those Employable

As a result of the evidence at the trial, there can be no real dispute about the fact that substantial numbers of methadone maintenance patients are capable of successful employment. The question remains as to how a prospective employer can identify those who will perform satisfactorily, and screen out those who are still abusing drugs or have other undesirable characteristics. There was intensive inquiry on this question at the trial.

My conclusion is that an employer such as the TA can perform this screening for methadone maintenance patients in basically the same way as in the case of other prospective employees.

The TA, like any large employer, has staff and facilities for ascertaining the mental and physical qualifications of prospective employees. The TA also has various systems for monitoring the performance of employees after they are hired. In cases where particular information must be obtained, the TA will consult with physicians, psychiatrists, hospitals, and other sources.

The TA must always make the best determination it can as to whether the applicant will have proper work habits, and whether there is a risk of undesirable conduct such as thievery, drunkenness or narcotic usage. The TA, like any employer, does not rely on hunch, but obtains *objective evidence—i.e.,* information about performance at school, employment history, current employment record, family ties, medical or psychiatric history, criminal record, and so forth.

In this connection, it is important to note that the TA has no blanket prohibition against the hiring of persons with criminal records. Individual consideration is given to the nature of the crime, and to the question of how it might relate to the job applied for. For instance, a record of theft would be considered against a person applying to handle money. The prior criminal record would be considered in the context of recent job stability and evidence of rehabilitation.

The TA has no blanket prohibition against the employment of persons taking drugs such as tranquilizers. When evidence of such usage appears, the TA believes it should "dig a little deeper" to find out about the circumstances. Inquiry may be made with the person's doctor. Consideration is given on an individual basis.

The TA has no absolute prohibition against the employment of persons formerly confined to a mental institution or persons who have been, or are currently being, treated by a psychiatrists on retainer to act as consultants where problems such as this arise. But again, the matter of employability is considered on an individual basis.

The TA does not maintain any blanket rule barring the hiring of persons with such medical problems as diabetes, epilepsy or heart disease. Individual consideration is given to applicants having these conditions. It is the policy of the TA to consider the hiring of such persons on an individual basis in light of such factors as their actual performance capabilities and the safety sensitivity of the job to which they seek appointment.

I return to the matter of objective exidence of employability, considered with respect to methadone maintenance patients. A crucial point here is that the record in this case demonstrates that there are large numbers of metha-

done maintenance patients who are able to provide to a prospective employer satisfactory objective evidence of employability. For instance, many methadone maintained persons can demonstrate that they have been on a reliable methadone program for a year or more; that they have faithfully abided by the rules of the program; that, according to systematic tests and observations, they have been free of any illicit drug or alcohol abuse for the entire period of treatment, excluding a possible adjustment period; that they have the necessary education or other training for the job; that they have stable family ties; and that they have a current successful employment record, and a successful work history.

In the background, of course, is the record of heroin addiction. Medical Director Lanzetta of the TA takes the view that when a man goes on heroin there is "some deficiency somewhere", which presumably persists thereafter, particularly while the person needs the "crutch" of methadone maintenance. Although there is no doubt that heroin addiction is a problem of the most severe nature, the presumption that heroin addiction invariably stems from some character defect, making a person more or less permanently unemployable, cannot be supported. The question about whether a person maintained on methadone has some defect or deficiency making him invariably a risky employee has been dealt with in detail heretofore in this opinion. The evidence is conclusively to the contrary.

The question in the individual case is whether the methadone maintenance person, despite the history of heroin addiction, is currently capable of employment. If the TA were being asked to employ a marginal or doubtful case—*i.e.*, a person who had been in a program only a short time and who had no work history or current employment record

—the TA might well be justified in giving little or no consideration to such an applicant. But the TA's blanket exclusionary policy applies with equal strength to the many methadone maintained persons who, from any rational standpoint, have objectively demonstrated their capability of being employed by means of evidence of freedom from drug abuse and employment record. Moreover, the TA's policy applies not only to what are obviously its most sensitive positions—such as subway motormen, subway towermen, bus drivers—but applies to all jobs in the TA, such as clerks and car cleaners. The TA refuses to consider a methadone maintenance person for employment, regardless of the evidence he presents about employability and regardless of what type of job he seeks at the TA.

I have referred a number of times to evidence of freedom from drug or alcohol abuse. The obvious source of such information is the methadone maintenance program.

In connection with obtaining information from methadone maintenance clinics, the TA makes two points: First, that some of the clinics—particularly the private ones—may not provide reliable information; and second, that the clinics may be legally prevented from giving full information to an employer regarding a patient. Neither point is of weight in the present case.

It is true that several of the witnesses indicated that there might be private clinics which could not be relied upon for accurate information about drug and alcohol abuse. Also, one of the witnesses from a "drug free" program expressed skepticism about the ability of one of the public programs—the City program—to consistently provide reliable information. On the latter point, the current director of the City program was thoroughly interrogated in this case, and the weight of the evidence is that the City pro-

gram is soundly managed and reliable within the bounds of normal human fallibility. In any event, the TA has never *tried* to obtain information from even those clinics such as Beth Israel which are unanimously agreed to be reliable. Employers such as Consolidated Edison have found that they can obtain satisfactory information about methadone maintenance patients in order to make intelligent employment judgments. There is no reason to believe that the TA cannot do the same thing.[3]

With regard to the legal restrictions imposed upon a methadone clinic in the giving out of information about patients, 21 U.S.C. § 1175(a) provides that records of the treatment of any patient in a federally regulated drug abuse prevention function shall be confidential and shall be disclosed only under the circumstances authorized in § 1175(b). Subsections (b)(1) and (g) provide in effect that such records may be disclosed in accordance with the prior written consent of the patient for such purposes as are allowed in regulations issued by the Director of the Special Action Office for Drug Abuse Prevention.

The applicable current regulations were issued June 25, 1975 and became effective on August 1, 1975. 42 C.F.R. §§ 2.1 *et seq.*, 40 Fed.Reg. 27802. Section 2.38 governs disclosure of information to employers. It is clear that under these regulations a methadone maintenance patient may

[3] There was some suggestion at the trial that it might be necessary or advisable to have a certification board or panel of experts to determine the employability of former addicts. But the weight of the evidence supports the proposition that an employer such as the TA can make this determination by its normal screening procedures. In the case of methadone maintained persons, the employer would naturally seek information from the program. But this is essentially no different from obtaining relevant references for other types of applicants. If the TA has legitimate doubts about the reliability of the information obtained from the program, it will accord such information little or no weight.

authorize release of information to an employer or prospective employer which is relevant to questions relating to employment.

Persons Having Terminated Methadone Maintenance

The great bulk of the evidence in this case related to the question of the employability of persons engaged in methadone maintenance programs. There was some evidence, although not a great deal, about the characteristics of persons who have successfully *completed* a methadone maintenance program and have withdrawn from methadone.

There are indications that at times these persons will return to the methadone maintenance programs. At times such persons revert to heroin. However, it is unquestioned that there are many methadone maintenance patients who successfully withdraw from methadone and stay clear of drug abuse thereafter. Plaintiff Beazer is such a person, having ceased using methadone almost two years ago.

In any event, it would appear that there would be effective means for objectively determining the qualifications for employment of a former methadone maintenance patient. There is no rational reason for maintaining an absolute bar against the employment of these persons regardless of their individual merits.

Policies of City, State, and Federal Governments

The City of New York, the State of New York and the Federal Government have taken various steps to eliminate bars to public employment of methadone maintenance patients and other former addicts.

On March 22, 1972 the New York City Department of Personnel issued a policy statement approved by various City officials and by the City Civil Service Commission.

The policy statement provided that a history of drug addiction shall not in itself constitute a bar to employment in any City position, except that appointments to the "uniformed services" would continue to be governed by "current medical and physical standards." The policy statement provided that where an applicant for City employment has a history of drug addiction, his case will be considered on its individual merits. The policy statement specifically provided that methadone maintenance patients should be assisted in obtaining City jobs.

This policy has had no effect on the TA, for reasons which will be described hereafter.

As to the exception for the "uniformed services," apparently the police, the firemen, and sanitation workers are included in this category. However, the evidence indicates that in fact there is no blanket exclusion of methadone maintenance patients in these departments at least as to all positions.

The New York State Civil Service Department and Drug Abuse Control Commission have promulgated certain "Operating Principles," providing that if an applicant for State employment has a history of drug abuse, the application should be considered on its merits, although a history of drug abuse may be considered the basis for denial of appointment in "certain sensitive positions" identified by the Civil Service Department. These Operating Principles specifically provide for assistance to methadone maintenance patients seeking State employment.

In 1972 Congress passed the Drug Abuse Office and Treatment Act, which provides in part that "no person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the ground of prior drug abuse." The statute goes on

to state that this provision does not apply to employment in the CIA, the FBI, or other similar agencies. 21 U.S.C. § 1180(c). Although the statute does not expressly so state, it would appear that a person successfully participating in a methadone maintenance program would be within the protection of the statute.

Mechanics of TA's Exclusion Policy

Positions in the TA consist of so-called "city-wide titles" and also titles which are unique to the TA. The city-wide titles are positions such as secretary, clerk, motor vehicle operator, which involve basically the same work in the TA and in City agencies. The TA has 3,400 employees in city-wide titles.

The New York City Civil Service Commission has adopted medical standards for city-wide titles in the TA, and these standards specify that a person who is successfully participating in a recognized methadone maintenance program may be employed. It is conceded that the TA avoids the effect of this rule by invariably passing over any methadone patient when applicants for city-wide title jobs at the TA are chosen from the Civil Service eligibility lists. The TA has the right under the Civil Service Law § 61 to choose any one of the top three applicants on the list at the time of a particular selection for a job.

With respect to the employment titles at the TA other than city-wide titles, the TA has its own medical standards which it has written, although they have been formally promulgated by the Civil Service Commission. These standards provide that an applicant may be rejected for a history of drug abuse, and it is clear that the TA uniformly rejects all persons with a history of drug abuse who are participating in methadone maintenance programs.

Position in the TA

The TA contends that it cannot afford to take what it considers the risks of employing present or past methadone maintained persons, except possibly those who have been successfully withdrawn from methadone for several years. The TA emphasizes that employees such as subway motormen have an immediate and heavy responsibility for the safety of large numbers of persons. The TA argues that many of its employees must work unsupervised throughout the wide geographical area covered by the TA system. Indeed, the TA's officer in charge of personnel, Wilbur McLaren, testified that "most of our people are literally unsupervised." The TA further contends that its jobs are attended by unusual hazards—such as the risk of a maintenance man being hit by a subway in a tunnel.

There can be little doubt about the unique sensitivity involved in jobs such as that of subway motorman. Despite the existence of various automatic safety devices to protect against the consequences of mistakes, the subway motormen and subway towermen (who control certain subway signals) and other similar employees of the TA must be persons of maximum alertness and competence.

One inevitable question raised by the present case is: "Do you want a methadone patient driving a subway train?" One answer to this question is that, under concededly valid rules of the TA, a person cannot become a subway motorman except by promotion from some other position in the TA. This means that a methadone maintained person seeking his first job with the TA *could not apply* to be a motorman. No one can be considered for the position of motorman until he has demonstrated satisfactory job performance *at the* TA in some other position for a period of a year or eighteen months, or more. The

same is true for the position of subway towerman. As to subway conductors (who control the opening and closing of subway doors), although technically this title is an "entry level" position, in fact the last two competitions for the position—in 1972 and 1975—were open only to existing TA employees seeking promotion. The position of bus driver is open to new applicants. In any event, as I will describe later in this opinion, I believe that it would be constitutionally permissible for the TA to refuse to employ present methadone maintained persons as motormen, conductors, towermen, bus drivers, and in similar operating positions.

But the essential point here is that the TA's exclusionary policy against methadone maintained persons is applied *not merely* with respect to the uniquely sensitive jobs such as motorman and other comparable positions, but is applied with respect to *every* category of work within the TA. It is perfectly clear that large numbers of the employees in the TA perform work essentially similar to the type of work done in other businesses and industries where methadone maintained persons appear to be successfully employed.

The TA (including MABSTOA) employs approximately 47,000 persons. It hires about 3000 employees annually. For various purposes, the TA divides its jobs into operating and non-operating positions. The principal operating positions, with the numbers of persons involved are:

Subway Motormen	3,300
Subway Conductors	3,200
Subway Towermen	600
Bus Operators	5,200
	12,300

However, the TA has almost 400 other job titles, largely in the non-operating category. The following are a few examples of non-operating titles, listed with the number of employees involved:

Accountant	25
Assistant Accountant	29
Architect	5
Assistant Architect	33
Junior Architect	5
Civil Engineer	79
Civil Engineer Draftsman	27
Assistant Civil Engineer	207
Junior Civil Engineer	58
Cashier	32
Clerk	378
Senior Clerk	286
Collecting Agent	145
Bookkeeping Machine Operator	49
Claim Examiner	60
Computer Operator	7
Keypunch Operator	57
Messenger	12
Railroad Caretaker	229
Railroad Porter	1162
Railroad Stockman	72
Railroad Stock Assistant	103
Railroad Watchman	162
Stenographer	44
Senior Stenographer	48
Typist	190
Senior Typist	33

There are other non-operating TA employees, which will be described in more detail hereafter.

The TA's contention that most of its employees work basically without supervision is somewhat belied by the large number of supervisory positions listed among the approximately 400 titles of TA employment. For instance, there at 21 kinds of foremen. There are a total of 1413 foremen in these 21 categories. There are 40 categories of employment at the TA bearing the title "Senior" attached to type of job—such as Senior Computer Operator, Senior Engineer. There are 12 types of "Superintendents" and 29 types of "Supervisors."

Most of the TA non-operating employees are under some direct supervision, or at least report to a foreman or supervisor who determines that the employees are fit for duty.

All TA employees (except perhaps at the very high levels) are on probation for the first six months of their employment. This applies to both new employees and ones who have been promoted from another TA job. During probation there is close scrutiny by a supervisor.

For various purposes the TA considers certain positions as "critical" or safety-sensitive, and other positions as "non-critical." For instance, periodic physical examinations are given to persons in various critical positions such as subway motormen, subway conductors and bus operators. As will be discussed in more detail hereafter, the TA treats an employee with an alcohol problem differently depending on whether the position is deemed critical or non-critical. Again, the principal critical categories are motormen, conductors and bus operators, although there are non-operating jobs, such as operating cranes and handling high voltage equipment, which are deemed to be critical. A non-critical job is defined by chief personnel officer McLaren, in connection with the alcohol issue, as one where "drinking would not directly relate to passengers' safety or overly ex-

pose other employees." The TA will permit a person having enough of a drinking problem to require treatment by the TA's alcoholic counselling service to remain on non-critical jobs. Such jobs include all the so-called "City-wide" titles (3400 persons); car cleaners (950 persons); and apparently a majority of the jobs involved in repairing subways and buses (total 3000 persons), maintaining subway track, structures and tunnels (total 6800 persons), and manning the subway stations (total 5600 persons).

Certain categories of employment bear further discussion. These are: (1) office work; (2) maintenance of subway cars and buses; (3) maintenance of track, structures and tunnels; (4) work in subway stations.

(1) *Office Work*

The total number of office workers is over 2,000. These include 1200 persons in various clerical and secretarial titles. Most of the office employees work in the two main offices of the TA at 370 Jay Street, Brooklyn, and the World Trade Center in Manhattan. They mainly work a daytime shift and are under normal office-type supervision.

(2) *Maintenance of Subway Cars and Buses*

There are about 6,600 employees involved in the maintenance of subway cars and buses.

This category includes 950 car cleaners.[4] About half of these do the daily sweeping and picking up of the cars. The

[4] Apparently this category includes both cleaners of subway cars and cleaners of buses, since there is no separate category of Bus Cleaner given in the list of employment titles furnished to the court. However, plaintiff Frasier applied for the position of "Bus Cleaner" in 1973. It will be assumed that Bus Cleaners perform essentially the same functions as Car Cleaners.

other half do the washing and other type of cleaning which occur on certain schedules. The sweeping and picking up are carried out at the two main subway yards at Coney Island and at 207th Street, and at 13 inspection stations. The washing and other cleaning work is carried out in the two main yards.

Most of the car cleaning is done at night. While some car cleaners work alone, generally they work in groups of two or more and are supervised by a foreman.

One of the objections of the TA to hiring methadone maintained persons for car cleaning is that various cleaning agents are used which might be toxic under certain circumstances, and that the effect of these cleaning agents might be "potentiated" by methadone. Dr. Vincent Lynch testified to this. However, Dr. Lynch admitted that the question of whether there might be some harmful effect depended upon the actual conditions of work at the TA, such as the concentration of the substances and the amount of fresh air ventilation. Dr. Lynch stated that he had tried to find out something about these conditions from the TA, had been unable to do so, and actually knew nothing about the conditions. I therefore can give no weight to the claim about "potentiation" of the effects of cleaning agents.[5]

[5] The TA has suggested that the cleaning work at the yards involves substantial danger because cleaners need to walk throughout the yards and might encounter third rails carrying 600 volts of electricity. In connection with this case I was taken on a tour of certain parts of the TA system, which included a visit to the Coney Island yard at night. We started at the outskirts of the yard, and crossed seemingly endless numbers of rails and third rails before we finally aproached some car cleaning operations. From later testimony, however, it appears that the car cleaners themselves approach their work far more conveniently. After arriving at the yard by subway or automobile, they walk via a parking lot and sidewalk to the foreman's office in the inspection shop, and then to the cars to be cleaned, usually crossing two or three tracks at most.

Another category of positions involves repair and parts replacement for subway cars. There are 3,000 TA employees in this category. These employees perform body work, mechanical and electrical work and painting. They work mainly in shops in the daytime, and generally in groups supervised by foremen.

The TA argues that this subway repair work involves unusual hazards because of the need to manipulate heavy machinery and power tools. But the uncontradicted evidence is that methadone maintained persons are performing successfully in comparable industrial jobs.

In any event, plaintiffs are not suggesting that just anyone on methadone be thrown into working with metal benders and boring machines. The person must be *qualified* for the job. For instance, in the case of Car Maintainer A (Body Work), he would be required under TA regulations to have substantial training and experience in such skills as fabrication of steel assemblies, welding and cutting of heavy gauge metals, forging, and the use of the necessary tools and power equipment. If a present or past methadone maintained person came to the TA and could demonstrate these qualifications, could demonstrate a current satisfactory employment record in this type of work, and could verify his freedom from illicit drugs for a substantial period of time, plaintiffs urge that he deserves to be considered for a job opening on his merits. The evidence supports this proposition.

As to repair of buses, there are about 1000 employees engaged in such work, divided about equally between day and night shifts. The work is mainly done in garages under the supervision of foremen, and is of a somewhat lighter nature than what is involved in the repair of subway cars. However, again there are requirements of extensive training and experience.

As already indicated, the TA deems many of the jobs connected with the repair and maintenance of subways and buses as "non-critical," so that a person with an alcohol problem may be permitted to continue in his job while rehabilitation attempts are being made. Car cleaners are considered non-critical.

(3) *Maintenance of Track, Structures and Tunnels*

This category of work is referred to by the TA as "maintenance of way." There are about 6800 employees involved. These employees lay and repair track, work on road beds, and also do all the other repair and maintenance work for tunnels, stations and elevated rail structures. They maintain the signals and also the equipment for supplying the power to the subway system. These employees include carpenters, masons, plumbers, electricians and metal workers. Also included are the persons who work on drainage pumps and ventilation fans—the type of work done by plaintiff Reyes.

Obviously, the work of these employees is spread throughout the subway system. However, these employees usually work in groups ranging from two or three to larger groups. A foreman will supervise a single group, or several small groups, as appropriate.

Maintenance of Way employees include 1500 trackmen, who work on the rails, ties, plates, ballast and "subgrade." They usually work in gangs of ten men or more under a foreman.

The TA argues that many Maintenance of Way employees are subjected to unique hazards involved in working in tunnels or on elevated structures where trains are passing, and where the third rail must be constantly avoided.

However, here again the TA has set high qualifications for the more sensitive jobs. Positions such as carpenter, mason, signal maintainer, and power distribution maintainer, can only be gained through promotion from helpers or trainees in those categories. A new employee will enter as a helper or trainee, and even the latter are required to have appropriate experience. The helper or trainee will work under close individual supervision for a year or more.

Again, many of the jobs connected with the maintenance of subway track, tunnels and structures are deemed "non-critical," so that a person with an alcohol problem may be permitted to keep working during rehabilitation efforts.

(4) Work in Subway Stations

There are about 5,600 employees involved in this category. They consist mainly of about 4,100 railroad clerks who sell the tokens; about 1,100 railroad porters, who sweep and clean the stations; and about 140 turnstile maintainers, who repair the turnstiles.

These employees work largely alone at the various subway stations throughout the system. However, it is clear that the railroad porter does not occupy a position of unique sensitivity. The TA points out that the railroad clerk and the turnstile maintainer are positions requiring honesty and alertness, and that these employees are sometimes robbed. But the evidence shows that methadone maintained persons are serving as bank tellers, and as cashiers in the Off-Track Betting offices. It is not reasonable to presume that they could *never* qualify for employment as railroad clerks or turnstile maintainers.

Railroad clerks, railroad porters and turnstile maintainers are deemed to be non-critical employees in the application of the policies regarding alcohol.

TA Policy Regarding Alcohol

Some further explanation is necessary regarding the TA's policy about alcohol. The TA's handling of drinking problems is far more lenient than anything suggested in this case regarding methadone maintained persons. Plaintiffs are seeking in this action consideration for employment as to persons whose heroin addiction is *in the past* and who are, at the time they apply to the TA, demonstrably free from drug or alcohol abuse.

Although the TA currently refuses to consider such persons for employment, the TA is willing to continue in employment a substantial number of persons with existing alcohol problems.

A TA employee is subject to discipline if he is found drinking on the job or unfit for duty because of drinking done before he came to work. There was some confusion among the TA witnesses as to exactly what discipline would be imposed. But basically, it appears that, at the time of the first offense, someone in a critical position such as motorman would be moved to a non-critical position such as platform conductor; and a person in a non-critical position would, upon the first offense, be given a three-day suspension and then returned to his job. If the TA believes that the employee has a drinking problem that needs counselling or treatment, he is sent to the TA's Employee Counselling Service, which exists to deal with problem drinkers. He may then be requested to attend Alcoholics Anonymous, or to go to a hospital if necessary. If hospital treatment occurs, an effort is made to have him return to work as soon as possible, because the TA feels "that occupational therapy at the time is a very essential part of their recovery," according to the testimony of Joseph Warren, Director of the Employee Counselling Service.

There are currently about 2300-2400 TA employees attending the counselling service.

As already indicated, persons having drinking problems sufficient to require extended counselling and treatment with the counselling service are permitted to be employed in a wide variety of jobs at the TA including office work, laying of track, cleaning and repair of subway cars, and so forth.

It is interesting to note that a person with a drinking problem may actually be permitted to function in positions such as subway motorman under certain circumstances. If a motorman realizes he has an alcohol problem and comes to the counselling service, or his family reports to the counselling service, he will undertake counselling and treatment on a confidential basis, according to Mr. Warren. This is treated as "highly classified information." The man's supervisor is not apprised, nor apparently is the man taken off the job, until and unless the supervisor detects some failure of performance.

Conclusions of Law

Applicable Law

There is no basic dispute among the parties as to the constitutional doctrines which apply to the present case. A public entity such as the TA cannot bar persons from employment on the basis of criteria which have no rational relation to the demands of the jobs to be performed. To do so is a violation of both the due process and equal protection clauses of the Fourteenth Amendment. This applies to new applicants for employment, and to existing employees threatened with termination.

Decisions dealing with the basic doctrines are *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 94 S.Ct. 791,

39 L.Ed.2d 52 (1974); *Sugarman* v. *Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); *Baker* v. *Columbus Municipal Separate School District*, 329 F.Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972).

In the *LaFleur* case the Court held invalid under the due process clause certain rules requiring teachers to take extended leaves of absence beginning with the fourth or fifth month of pregnancy. Justice Stewart, writing for the majority, held that such rules have the effect of creating irrebuttable presumptions of physical inadequacy, and that the constitution requires more individualized determination. Justice Powell concurred in the result, although he disagreed with the irrebuttable presumption theory. Justice Powell would permit certain classifications or rules relating to pregnant teachers, provided they were narrower and rationally related to a legitimate employment purpose.

Sugarman v. *Dougall, supra,* held unconstitutional, as violating the equal protection clause, a provision in the New York Civil Service Law that no person would be eligible for state employment in the "competitive class" if not a United States citizen. Justice Blackmun, writing for the majority, made it clear that the state might, "on the basis of an individualized determination," validly refuse public employment because of noncitizenship in certain types of positions where this factor bore some rational relationship to the demands of the position. However, "a flat ban" on the employment of aliens could not withstand scrutiny under the Fourteenth Amendment.

The Supreme Court's decision in *LaFleur, supra,* was anticipated by the Second Circuit decision in *Green* v. *Waterford Board of Education,* 473 F.2d 629 (2d Cir.

1973). In this case emphasis was laid upon the fact that a pregnant teacher was treated differently from persons having other forms of disability. The court stated (473 F.2d at 634-5):

> "Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained."

Application to the Present Case

Under the above authorities, I hold that the TA's blanket ban against the employment of all present and past methadone maintained persons in *any* position in the TA is a violation of the due process and equal protection clauses of the Fourteenth Amendment.

It is perfectly clear that there are substantial numbers of present or past methadone maintained persons who would be capable of performing many of the jobs at the TA. Individual consideration, or narrower rules rationally related to certain classifications of jobs, are constitutionally required.

The lack of a reasonable basis for the present policy of the TA is particularly evident from the markedly different treatment given to problem drinkers—persons presenting greater risks than those members of the plaintiff class for whom employment is sought. *See Green* v. *Waterford Board of Education, supra.*

I recognize that there are differences of opinion as to the merits of methadone maintenance as a treatment for heroin addiction. For one thing, there is a conscientious body of opinion strongly objecting on philosophical grounds

to the long-term use of one drug to combat the effects of another drug. However, as plaintiffs' experts point out, one might also challenge on philosophical or moral grounds the use of alcoholic and the use of other "licit" drugs by large segments of the population. Obviously, the constitutional rights of methadone maintained persons cannot be decided on the basis of these considerations.

I wish to stress certain things *not* compelled by my holding. The TA is not required to hire any present or past methadone maintained person where there is a legitimate reason to question the person's ability or competence —including a legitimate reason to believe that the person is abusing illicit drugs or alcohol. The TA is not required to rely on references from methadone clinics or programs where there is reason to doubt the reliability of such information. The TA is not prevented from making reasonable rules and regulations about methadone maintained persons—such as requiring satisfactory performance in a program for a period of time such as a year, or forbidding methadone maintained persons employment in sensitive categories such as that of subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment. As in *Sugarman* v. *Dougall,* 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973), the problem is the TA's flat ban, which goes beyond any rational or legitimate needs of the TA, and excludes persons just as qualified for employment as many who are hired by the TA.

One other question to be dealt with at this point relates to the suggestion at the trial that there may be methadone maintained persons who are working for various employers, including the TA, where the employers are unaware of that fact. Surely there is nothing which consti-

tutionally prevents the TA from inquiring of its employees, or applicants for employment, whether they are or were on methadone maintenance programs. Upon such inquiry, the employees or applicants would be obligated to disclose the fact.

Returning to the main issue, I hold that plaintiffs and their class are entitled to relief under the Fourteenth Amendment and under 42 U.S.C. § 1983.

The § 1981 and Title VII Claims

Since I have decided that relief is warranted as described above, I need not reach the claims of racial discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The "City" Defendants

Although plaintiffs have shown a right to relief in this case against the TA, MABSTOA, and their officials who have been sued, there is no showing of any wrongdoing or any need for relief as against the New York City Civil Service Commission or the New York City Personnel Department, or any officials connected with these two entities.

Relief to be Granted

In connection with the relief to be granted, there are two subjects to be covered: First, the relief for the named plaintiffs; second, the relief for the class.

With respect to the named plaintiffs, the basic error committed by the TA was determining these persons' status on the basis of the TA's blanket exclusion of present and past methadone maintained persons. The TA will be directed to re-examine the employability of each of the four

named plaintiffs without regard to this invalid policy. The TA will then submit its conclusions to the court. The court will then finally determine whether any of the named plaintiffs should be reinstated or hired, and what rights to back pay there are, if any.

With respect to the class, plaintiffs are directed to submit a proposed permanent injunction based upon the principles announced in this opinion, and the TA defendants are to review and comment upon plaintiffs' proposal.

I have in mind that the injunction cannot provide for the detailed handling of all situations which might arise. Obviously, no one knows at the present juncture exactly who will apply for what job. The injunction should contain certain basic directions and guidelines. Thereafter the court will retain jurisdiction for a period of time to implement the injunction.

APPENDIX D

Opinion and Judgment of the District Court of the Southern District of New York, Entered May 5, 1975

CARL A. BEAZER, *et al.*,

Plaintiffs,

—v.—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants.

No. 72 Civ. 5307.

UNITED STATES DISTRICT COURT, S. D. NEW YORK

May 5, 1976.

Legal Action Center of the City of New York, Inc., New York City, Elizabeth B. DuBois, Eric D. Balber, Mark C. Morril, Michael Meltsner, New York City, for plaintiffs.

Stuart Riedel, Gen. Counsel, New York City Transit Authority, by E. W. Summers, G. T. Dunn, L. Smejda, Brooklyn, N. Y., for defendants.

SUPPLEMENTAL OPINION

GRIESA, *District Judge.*

On August 6, 1975 I filed a decision holding that the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority (hereafter collectively referred to as "the TA") are committing violations of the

due process and equal protection clauses of the Fourteenth Amendment, and also violations of 42 U.S.C. § 1983, in their blanket refusal to employ any former heroin addicts participating in, or having completed, methadone maintenance programs, regardless of individual merits.

In that decision, I noted the allegation of plaintiffs that the exclusionary policy has a disparate impact on blacks and Hispanics, resulting in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* However, I deemed it unnecessary to reach this racial discrimination claim.

Plaintiffs have received their application for relief under Title VII. Admittedly, the sole purpose of this application is to obtain the benefit of the provision in Title VII authorizing the award of a reasonable attorney's fee to the prevailing party. 42 U.S.C. § 2000e-5(k). In the absence of such express statutory authority the award of fees in the present case could not be made. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

It is clear that the question of the attorney's fee deals with a substantial right, and plaintiffs are entitled to an adjudication of their Title VII claim. I hold that the proof establishes a valid cause of action under Title VII, and that plaintiff's attorneys are entitled to the award of a reasonable fee, to be assessed.

The relevant provisions in Title VII prohibiting racial discrimination in employment are contained in 42 U.S.C. 2000e-2(a), which provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any indi-

vidual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The cases hold that Title VII does not require proof of a purpose or intent to carry out racial discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). It is sufficient to prove that an employer has adopted a test or criterion for employment which in fact operates in a racially discriminatory manner against minority races, where that criterion is not shown to be related to job performance. *Id.* at 431. *See United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

I have already held in my earlier opinion that the blanket exclusionary policy of the TA against present and former methadone maintenance patients is not rationally related to any employment or business needs of the TA. This leaves for determination, under the Title VII claim, the question of whether the policy of the TA has a racially discriminatory effect against blacks and Hispanics.

The four named plaintiffs are members of minority races or national groups. Two are blacks and two are Hispanics. Of the TA employees referred to the TA's medical consultant for suspected violation of its drug policy since July 1972, 81% were black and Hispanics and only 19% were white.

Plaintiffs place their greatest reliance on the argument that, although the policy of the TA is racially neutral on its face (dealing solely with problems of drug addiction and treatment), the impact of the policy will tend inevitably to exclude more blacks and Hispanics from TA employment, because of the admitted fact that the class of present and former methadone maintained persons includes substantially more blacks and Hispanics than whites.

Between 62% and 65% of methadone maintained persons in New York City are black and Hispanic, meaning that there are almost twice as many blacks and Hispanics as there are whites in this category. Thus the policy of the TA, while not adopted with a purpose of racial discrimination, has been shown to have a substantially greater impact on minority groups than on whites. Since the policy is not grounded in any business necessity, it violates Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. at 430 n.6, 91 S.Ct. 849; *Green* v. *Missouri Pacific R.R.*, 523 F.2d 1290, 1293-95 (8th Cir. 1975); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 918 (5th Cir. 1973); *Gregory* v. *Litton Sys.*, 316 F.Supp. 401, 403 (C.D.Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972). The fact that other policies of the TA apparently have resulted in a liberal amount of employment for minorities by the TA is not a defense with respect to the exclusionary policy under scrutiny in this case. *Davis* v. *Washington*, 168 U.S.App.D.C. 42, 512 F.2d 956, 960-61 and n.31 (1975), *cert. granted*, 423 U.S. 820, 96 S.Ct. 33, 46 L.Ed. 2d 37 (1975), *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 443 (5th Cir. 1971) *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

In a Title VII case, attorney's fees are normally awarded to the prevailing party, unless there are exceptional circumstances indicating that such an award should

not be made. No such circumstances exist in the present case. Plaintiffs are clearly entitled to a fee award. *Lea* v. *Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). *See Alyeska Pipeline Service Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 261-62, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Northcross* v. *Board of Educ.*, 412 U.S. 427, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *Fort* v. *White*, 530 F.2d 1113 (2d Cir. 1976).

A hearing will be held on the amount of the award.

So ordered.

APPENDIX E

Amended Permanent Injunction and Judgment of the District Court of the Southern District of New York, Entered January 24, 1977

72 Civ. 5307 (T.P.G.)

CARL A. BEAZER, *et al.*,

Plaintiffs,

—against—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants.

AMENDED PERMANENT INJUNCTION AND JUDGMENT

WHEREAS,

(1) on May 20, 1976, this Court entered a Permanent Injunction and Judgment against defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and certain related defendants (hereinafter referred to as the "TA"), paragraphs 4 and 5 of which Order contemplated further action by this Court; and

(2) on September 24, 1976, plaintiffs moved this Court for an order modifying the May 20, 1976 Order; and

(3) on May 5, 1976, this Court declared that plaintiffs were entitled to the award of a reasonable attorneys' fee pursuant to Title VII of the 1964 Civil Rights Act; and

(4) on October 29, 1976, plaintiffs moved this Court for an order declaring defendants' liability for attorneys' fees pursuant to the Civil Rights Attorneys' Fee Award Act of 1976 and fixing the amount of fees;

ACCORDINGLY, this Court having considered all papers and proceedings had herein relating to the above mentioned motions and having held hearings on January 11, 13 and 21, 1977 to consider these matters and having made findings on the record at these hearings, that

(1) plaintiffs Francisco Diaz and Malcolm K. Frasier are entitled to individual relief; and

(2) plaintiffs Carl A. Beazer and Jose Reyes and class member Nathaniel Wright are not entitled to relief; and

(3) plaintiffs are entitled to the award of a reasonable attorneys' fee.

IT IS HEREBY ORDERED that the decretal provisions of the Permanent Injunction and Judgment, as amended, shall read as follows:

1. Except as specified in Paragraphs 2 and 3, the TA, its members, directors, officers, agents and employees, are permanently enjoined and restrained from denying employment to, or dismissing from employment, any person solely because of present or past participation in methadone maintenance treatment.

2. Except as specified in Paragraph 3, the employability of present or past methadone maintained persons (in all phases of the employment process, including new applications, promotions, transfers, disciplinary proceedings and dismissals) shall be considered by the TA according to ap-

propriate personnel procedures to determine the suitability of the individual for the particular job. In the case of a present or past methadone maintained person, the TA is entitled to take in consideration all relevant factors about the person's drug history, and the quality and reliability of any methadone maintenance program having treated the person, in determining the person's suitability for the job.

3. This injunction does not prevent the TA from using appropriate standards regarding the employability of present or past methadone maintained persons, such as:

(a) A requirement of satisfactory performance in a methadone maintenance program for a specified period, such as a year, as a condition for employment;

(b) A restriction against employment of such persons in sensitive categories such as subway motorman, subway conductor, subway towerman, bus driver, and positions dealing with high voltage equipment.

4. As soon as an appropriate position becomes available, the named plaintiff Francisco Diaz shall be hired by the TA as a Maintainer's Helper Group (D), or in an equivalent position, with back pay and seniority rights from January 1, 1973. The TA shall not be entitled to use the provisions of New York City Civil Service Law §61 (the "one in three" rule) to deny employment to plaintiff Diaz. The amount of back pay received by plaintiff Diaz shall be offset by the amount actually earned from other employment and unemployment benefits.

5. As soon as an appropriate position becomes available, the named plaintiff Malcolm K. Frasier shall be hired by the TA as a Bus Cleaner, or in an equivalent position, with back

pay and seniority rights to which he would have been entitled if he had not been initially rejected for employment as a Bus Cleaner. The TA shall not be entitled to use the provisions of New York Civil Service Law §61 (the "one in three" rule) or any other device to deny employment to plaintiff Frasier. The amount of back pay received by plaintiff Frasier shall be offset by the amount actually earned from other employment and unemployment benefits.

6. All persons who have resigned, been dismissed from or denied TA employment due to present or past participation in methadone maintenance treatment shall be eligible for reexamination for TA employment under the terms of this injunction, and shall be given notice to that effect, pursuant to the following procedure:

(a) Counsel for plaintiffs shall submit for the Court's approval an appropriate list of persons to be given notice, and the text of a proposed notice. The notice shall indicate that a decree has been entered giving relief to plaintiffs' class and shall state that persons who believe they may be entitled to relief under the decree may contact plaintiffs' counsel;

(b) After said list and notice are approved by the Court, the TA shall within one week provide plaintiffs' counsel with the latest, most complete address in its possession for each person on the list and plaintiffs shall promptly mail said notice to all persons appearing on said list;

(c) Plaintiffs' counsel shall submit to the TA the names and addresses of those persons who respond to said notice, or who otherwise contact plaintiffs' counsel, as to whom plaintiffs' counsel believe that they have a *bona fide* claim to be members of plaintiffs' class;

(d) With respect to persons whose names are submitted to the TA pursuant to subparagraph (c) *supra* the TA shall, within sixty (60) days of said submission, reexamine said persons to determine their employability pursuant to the terms of this injunction and shall submit a report regarding same to the Court and to counsel for plaintiffs. After the reports required by this subparagraph are submitted the Court shall take appropriate action.

7. The provisions of ¶6 *supra,* shall not be to the prejudice of the right of persons claiming to be members of plaintiffs' class to independently notify the TA of their desire to be reexamined for TA employment pursuant to the terms of this injunction. Such persons shall be reexamined as though they were persons whose names had been submitted to the TA pursuant to ¶6 *supra,* and shall be afforded the same rights given said persons.

8. Fees in the amount of $360,710 and costs and disbursements in the amount of $14,290 shall be paid by the Transit Authority to the Legal Action Center of the City of New York, Inc.

9. The action is hereby dismissed as to plaintiffs Carl A. Beazer and Jose Reyes, and class member Nathaniel Wright, and as to the Civil Service Commission of the City of New York, the Personnel Department of the City of New York, Harry T. Bronstein, Chairman of the Civil Service Commission and Director of the Personnel Department, and David Stadtmauer and James W. Smith, members of the Civil Service Commission and their successors in office, without costs.

10. This Court reserves and retains jurisdiction herein for the purpose of construing or enforcing this order, awarding further plaintiffs' costs and attorneys' fees, if appropriate, and granting any other further relief that may be necessary.

/s/ THOMAS P. GRIESA
Thomas P. Griesa
U.S.D.J.

Dated: New York, New York
January 24, 1977

APPENDIX F

Civil Rights Act of 1871, April 20, 1871, c. 22 (R.S. 1979): 28 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

APPENDIX G

Civil Rights Act of 1964, Pub. L. 88-352, July 2, 1964, 78 Stat. 241: Title VII, 42 USC § 2000e

SUBCHAPTER VI.—EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The terms "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five

employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any knid, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or

an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospec-

tive employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Pub. L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub. L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103.

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Pub.L. 88-352, Title VII, § 702, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 3, Mar. 24, 1972, 86 Stat. 103.

§ 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individua[1], for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning

is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is

subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted an account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

APPENDIX H

Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, October 19, 1976, 90 Stat. 2641, 42 USC § 1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

APPENDIX I

Fourteenth Amendment, Section 1, of the Constitution of the United States

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

New York Public Authorities Law, Article 5, Title 9, §§ 1201, 1202, 1203

§ 1201. New York city transit authority

1. A board, to be known as "New York City Transit Authority" is hereby created. Such board shall be a body corporate and politic constituting a public benefit corporation. It shall consist of nine members, all serving ex officio. Those members shall be the persons who from time to time shall hold the offices of chairman and members of metropolitan transportation authority.

2. The chairman of such board shall be the chairman of metropolitan transportation authority, serving ex officio. He shall be the chief executive officer of the authority and shall be responsible for the discharge of the executive and administrative functions and powers of the authority, but he shall be empowered to delegate any one or more of such functions or powers, including, without limitation, that of appointment, discipline and removal of officers and employees, to one or more executive officers appointed by the board.

3. The chairman and other members of the board shall not be entitled to compensation for their services but shall be entitled to reimbursement for their actual and necessary expenses incurred in the performance of their official duties.

4. Notwithstanding any inconsistent provisions of this or any other law, general, special or local, no officer or employee of the state or any public corporation, as defined

in the general corporation law,[1] shall be deemed to have forfeited or shall forfeit his office or employment or any benefits provided under the retirement and social security law or under any public retirement system maintained by the state or any of its subdivisions by reason of his being a member or the chairman of the authority.

5. A majority of the whole number of members of the authority then in office shall constitute a quorum for the transaction of any business or the exercise of any power of the authority. Except as otherwise specified in this title, for the transaction of any business or the exercise of any power of the authority, the authority shall have the power to act by a majority of the members present at any meeting at which a quorum is in attendance.

Formerly § 1801, added L.1955, c. 579, § 1; amended L.1956, c. 504; L.1957, c. 547, § 3; L.1957, c. 714; renumbered 1201, L.1957, c. 914, § 3; amended L.1964, c. 431; L.1967, c. 717, § 70, eff. March 1, 1968.

§ 1202. Purposes of the authority

1. The purposes of the authority shall be the acquisition of the transit facilities operated by the board of transportation of the city and the operation of transit facilities in accordance with the provisions of this title for the convenience and safety of the public on a basis which will enable the operations thereof, exclusive of capital costs, to be self-sustaining.

2. It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state of New York and the authority shall be regarded as

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[1] See General Corporation Law § 3.

performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title.

Formerly § 1802, added L.1953, c. 200; renumbered 1202, L.1957, c. 914, § 3, eff. April 24, 1957.

§ 1203. Transfer of transit facilities by the city to the authority

1. a. On or before June first, nineteen hundred fifty-three, the city may, by resolution of the board of estimate or by instruments authorized by any such resolution, enter into an agreement with the authority for the transfer to the authority, for use in the execution of its corporate purposes, of the transit facilities now owned or hereafter acquired or constructed by the city and any other materials, supplies and property incidental to or necessary for the operation thereof. Any such agreement shall provide for transfer of such facilities by deed, lease, license or other arrangement, provided the term thereof shall not be less than ten years and authorize the authority to take jurisdiction, control, possession and supervision of such transit facilities, materials, supplies and property on or before June fifteenth, nineteen hundred fifty-three.

b. (i) Such agreement shall provide that capital costs of a nature not heretofore charged as operating expenses shall be paid by the city, or at the option of the authority may be paid in the first instance by the authority but in such event, the authority shall be entitled to recover from the city the amount of such costs; provided, however, that the total amount of such capital costs which the authority may incur without the approval of the mayor in any fiscal year shall not exceed five million dollars and that no other

such capital costs shall be incurred by the authority without such approval. Where the city is required to reimburse the authority for the amount of any capital costs pursuant to such agreement, serial bonds or capital notes may be issued by the city, pursuant to the local finance law, to finance any such reimbursement in the same manner and to the same extent as if such costs were to be paid directly by the city.

The authority shall submit annually to the city planning commission and the mayor of the city on or before October fifteenth in each year an estimate of all such capital costs for inclusion in the capital budget of the city.

(ii) From and after March first, nineteen hundred sixty-eight, the authority shall also have the right to incur capital costs of such nature in its own name to the extent that capital funds are available to it for expenditures of such nature pursuant to the provisions of section twelve hundred nineteen-a of this chapter or of any other provision of law, which capital costs shall not be payable by the city; provided, however, that no project to be financed by the use of such capital funds which is estimated by the authority to involve an expenditure in excess of one million dollars shall be commenced unless the mayor and the board of estimate shall each have been notified in writing by the authority of the intent of the authority to undertake such project and the nature thereof. No such project shall be commenced if and to the extent that either the mayor or a majority in voting power of the members of the board of estimate shall find that it is incompatible with sound planning for the development or redevelopment of the city, provided such finding, together with the reasons therefor, is set forth in a writing delivered to the authority within thirty days of the receipt by the mayor or the board of

estimate, as the case may be, of the notification of the authority relating to such project. If any such project is not so disapproved, it may nevertheless not be commenced unless and until the city shall have been given an opportunity to include the same in the capital budget of the city for the first fiscal year of the city commencing not less than six months after receipt of such notification. If and to the extent that such project is included in such capital budget, the authority may not thereafter incur capital costs for the same in its own name. If or to the extent such project is not included in such capital budget, the authority may incur capital costs for the same in its own name. The operation of sections twenty, twenty-one and twenty-two of the rapid transit law shall be suspended with respect to any project financed with the capital funds referred to in this subparagraph.

c. Such agreement shall provide that the authority shall have the use and possession of all property owned or leased by the city and used or occupied by the board of transportation on March fifteenth, nineteen hundred fifty-three in connection with or incidental to the operation of such transit facilities.

d. No provision in such agreement shall purport to limit or restrict or have the effect of limiting or restricting, the power granted the authority to manage, control or direct the maintenance and operation of such transit facilities or the fares or service thereof.

2. Such agreement shall provide for payment by the city of:

a. Capital costs for projects connected with such transit facilities included in the capital budget of the city for periods prior to December thirty-first, nineteen hundred

fifty-three, except that the authority shall not require payment of, and the city shall not pay, capital costs of such projects without prior approval of the board of estimate.

b. Liabilities of the city or the board of transportation for:

(1) Pension or retirement contributions on behalf of persons who were employed on transit facilities heretofore acquired by the city.

(2) Contributions to the New York City employees' retirement system on behalf of officers or employees whose compensation has been paid out of the operating revenues of the board of transportation of the city, which contributions have or shall hereafter become due or payable for fiscal years of the city ending on or before June thirtieth, nineteen hundred fifty-three.

c. All other liabilities of the board of transportation on the date of the conveyance.

d. Ten million dollars derived from any funds of the city (but not from borrowed funds), or from the operating fund of the board of transportation at the time of such transfer, for use by the authority as initial working capital (1) in partial consideration of the acceptance by the authority of the initial transfer, in which case the sum shall not be repaid, or (2) as a loan, in which case such sum shall be repaid in not less than five nor more than ten equal annual installments, commencing July first, nineteen hundred fifty-four.

3. a. Such agreement may contain provisions relating to the use and occupancy by the authority of real property (in addition to that transferred pursuant to subdivision

one of this section) now or hereafter owned or leased by the city, on such terms as may be mutually agreed upon by the city and the authority, and may provide for or authorize surrenders to the city of property no longer required by the authority.

b. The authority shall be entitled to utilize the officers, employees, agents, facilities and services of the city on the same terms and conditions as were applicable to or provided to the board of transportation on March fifteenth, nineteen hundred fifty-three.

4. The city and the authority are hereby authorized and empowered to make or enter into any contracts, agreements, deeds, leases, conveyances or other instruments as may be necessary or appropriate to effectuate the purposes of this title and they shall have complete power and authority to do and to authorize the doing of all things, incidental, desirable or necessary to implement the provisions of this section.

5. Upon the filing by the authority with the clerk of the city and the secretary of state of a copy of the instruments or documents effectuating the transfer, the authority shall take possession and control of the transit facilities and other property transferred thereby together with all contracts, books, maps, plans, papers and records of or in the possession of the board of transportation of whatever description, incidental to or necessary for the operation of the facilities transferred by such agreement or the performance of the duties of the authority as provided by this title.

6. When in the discretion of the authority there is available a supply of electric power adequate for the efficient and proper operation of the transit facilities either from a

private utility or otherwise at rates and under circumstances deemed by the authority to be reasonable, the authority may make such provisions for the utilization of such electric power as it may see fit and surrender to the city the power plants presently leased by the authority from the city pursuant to the provisions of this title. The foregoing provisions of this subdivision shall be applicable only to action of the authority undertaken prior to February first, nineteen hundred and sixty.

7. Notwithstanding the aforesaid provisions of this section, the city may transfer to the authority title and ownership to the materials, supplies and property incidental to or necessary for the operation of the transit facilities which were heretofore leased to the authority, and the authority and the city may enter into an agreement, modifying the agreement of lease dated June first, nineteen hundred fifty-three, as amended, renewed and supplemented, to provide for such transfer of title and ownership and containing such further terms and conditions, not inconsistent with the law, as may be agreed upon between the parties. Formerly § 1803, added L.1953, c. 200; amended, L.1953, c. 201, §§ 4, 5; L.1953, c. 880, §§ 1, 2; renumbered 1203, L.1957, c. 914, § 3; amended L.1959, c. 857, § 2; L.1964, c. 513, § 1; L.1964, c. 576, § 68; L.1967, c. 717, § 71, eff. March 1, 1968.

APPENDIX K

Order of The United States Court of Appeals, Second Circuit, Granting Petitioner's Motion for a Stay of Issuance of Mandate

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 10th day of March, one thousand nine hundred and seventy-eighth.

CARL A. BEAZER, JOSE R. REYES, FRANCISCO DIAZ, individually and on behalf of all others similarly situated, MACOLM K. FRASIER,

Plaintiffs-Appellees-Appellants,

—v.—

NEW YORK TRANSIT AUTHORITY, WILLIAM J. RONAN, individually and in his capacity as a member and as Chairman and Chief Executive Officer of the New York City Transit Authority, *et al.*,

Defendants-Appellants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellants cross-appellees New York City Transit Authority by notice of motion dated February 15, 1978

to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari. be and it hereby is granted.

/s/ WALTER R. MANSFIELD
(per EA)
Walter R. Mansfield

/s/ JAMES L. OAKES
James L. Oakes

/s/ CHARLES BRIEANT
(*USDJ by Desig.*)
Charles Brieant
Circuit Judges